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Report of the United Nations Commission on International Trade Law

Forty-third session
(21 June-9 July 2010)

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Sixty-fifth session
Supplement No. 17

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-third session of the Commission, held in New York from 21 June to 9 July 2010.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The forty-third session of the Commission was opened by the Under-Secretary-General for Legal Affairs, the Legal Counsel, on 21 June 2010.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 22 May 2007, on 3 November 2009 and on 15 April 2010, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Belarus (2011), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417), 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009, and two were elected by the Assembly at its sixty-fourth session, on 15 April 2010. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

5. With the exception of Bahrain, Bolivia (Plurinational State of), Botswana, Gabon, Latvia, Malta, Morocco, Namibia, Sri Lanka and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Belgium, Ethiopia, Finland, Ghana, Guatemala, Iraq, Kuwait, Libyan Arab Jamahiriya, Madagascar, Netherlands, Panama, Qatar, Slovakia, Slovenia, Switzerland, Trinidad and Tobago, and United Arab Emirates. In addition, an observer from the Holy See attended the session.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: Office of Legal Affairs of the Secretariat, International Monetary Fund, International Telecommunication Union (ITU), World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, European Bank for Reconstruction and Development (EBRD), European Union and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association (AAA), American Bar Association (ABA), American Bar Foundation, Arab Association for International Arbitration, Asia Pacific Regional Arbitration Group, Association for the Promotion of Arbitration in Africa, Association Française des Entreprises Privées, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Comité Français de l'Arbitrage, Commercial Finance Association, Consultative Group to Assist the Poor, Corporate Counsel International Arbitration Group, European Communities Trade Mark Association, Independent Film and Television Alliance, Insolvency and Bankruptcy Professionals (INSOL), International Air Transport Association (IATA), International Arbitration Institute, International Association of Restructuring, International Bar Association (IBA), International Institute for Sustainable Development, International Law Institute, International Swaps and Derivatives Association, International Trademark Association, Moot Alumni Association, New York City Bar, Pace Institute of International Commercial Law, Regional Centre for International Commercial Arbitration - Lagos, and Queen Mary University of London, School of International Arbitration;

(d) *Other entities having received a standing invitation to participate as observers in the General Assembly and maintaining permanent offices at Headquarters*: Sovereign Military Order of Malta.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the

Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chair: Ricardo Sandoval López (Chile)

Vice-Chairs: Salim Moollan (Mauritius)

Kathryn Sabo (Canada)

Wisit Wisitsora-at (Thailand)

Rapporteur: Gerard Jirair Mekjian (Armenia)

D. Agenda

10. The agenda of the session, as adopted by the Commission, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules.
5. Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property.
6. Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency.
7. Procurement: progress report of Working Group I.
8. Possible future work in the areas of electronic commerce and online dispute resolution.
9. Possible future work in the area of insolvency law.
10. Possible future work in the area of security interests.
11. Possible future work in the area of microfinance.
12. Monitoring implementation of the 1958 New York Convention.
13. Technical assistance to law reform.
14. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
15. Status and promotion of UNCITRAL legal texts.
16. Working methods of UNCITRAL.

17. Coordination and cooperation:

(a) General;

(b) Reports of other international organizations.

18. Role of UNCITRAL in promoting the rule of law at the national and international levels.

19. International commercial arbitration moot competitions.

20. Relevant General Assembly resolutions.

21. Other business.

22. Date and place of future meetings.

23. Adoption of the report of the Commission.

E. Establishment of a Committee of the Whole

11. The Commission established a Committee of the Whole and referred to it for consideration agenda item 4. The Commission elected Michael Schneider (Switzerland) to chair the Committee of the Whole in his personal capacity. The Committee of the Whole met from 21 to 25 June 2010 and held 10 meetings. At its 910th meeting, on 25 June, the Commission considered and adopted the report of the Committee of the Whole and agreed to include it in the present report (see para. 187 below). (The report of the Committee of the Whole is reproduced in paras. 16-186 below.)

F. Adoption of the report

12. At its 910th meeting, on 25 June, 915th and 916th meetings, on 30 June, 919th meeting, on 2 July, and 924th meeting, on 9 July 2010, the Commission adopted the present report by consensus.

III. Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules

A. Organization of deliberations

13. The Commission had before it the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-first (Vienna, 14-18 September 2009) and fifty-second (New York, 1-5 February 2010) sessions (A/CN.9/684 and A/CN.9/688, respectively) and the text of the draft revised UNCITRAL Arbitration Rules, as it resulted from the third reading by the Working Group at its fifty-second session and as contained in document A/CN.9/703 and Add.1. The Commission took note of the summary of the deliberations on the draft revised UNCITRAL Arbitration Rules since the forty-fifth session of the Working Group (Vienna, 11-15 September 2006). The Commission also took note of the comments on the draft revised UNCITRAL

Arbitration Rules that had been submitted by Governments and international organizations, as set out in document A/CN.9/704 and Add.1-10.

14. The Commission recalled that, at its thirty-ninth session, in 2006, it had noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules (1976)[2] were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of them should not alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex.[3] At its fortieth session, in 2007, the Commission had noted that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations.[4]

15. The Committee of the Whole, established by the Commission at its current session (see para. 11 above), proceeded with the consideration of the text of the draft revised UNCITRAL Arbitration Rules. The report of the Committee is reproduced in section B below.

B. Report of the Committee of the Whole

Section I. Introductory rules

Scope of application

Draft article 1

16. The Committee agreed that the words in brackets in paragraph 2 should be replaced with the words "15 August 2010". The Committee agreed that the revised Rules should be effective as from that date. With that modification, the Committee adopted the substance of draft article 1.

Notice and calculation of periods of time

Draft article 2

17. The Committee considered draft article 2 and noted that it was one of the provisions that had not been fully considered by the Working Group during the third reading of the draft revised Rules.

18. A number of concerns were raised regarding draft article 2. As a matter of structure, it was suggested that it was preferable to describe first the acceptable means of communication, as currently laid out in paragraph 3, and only thereafter to deal with issues regarding receipt of a notice delivered through such means of

[2] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

[3] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

[4] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.

communication. For that reason, it was proposed to place paragraph 3 as a first paragraph in draft article 2.

19. It was said that the requirement in paragraph 3 for the communication to provide a record of the information contained therein would seem to rule out many commonly used methods of verifying that a communication had been received, such as courier receipts. In addition, the requirement that the means of communication provide a record of its receipt was said to appear inconsistent with the purpose of paragraphs 1 (b) and 2, which dealt with deemed receipt. That requirement was said to be unusual and likely to give rise to practical difficulties. It was proposed to refer instead to the "transmission", "delivery" or "sending" of the notice and to avoid any reference to the notion of receipt in paragraph 3. It was said that, in cases where the addressee denied that a notice had been received, that matter would have to be dealt with by the arbitral tribunal, according to draft article 27, paragraph 1, on the burden of proof.

20. The Committee recalled the decision made in the Working Group to expressly include in the Rules language that authorized both electronic and traditional forms of communication. In that respect, it was said that the revised version of draft article 2 should include language consistent with previous standards prepared by UNCITRAL in the field of electronic commerce, such as the UNCITRAL Model Law on Electronic Commerce[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).[6] It was suggested that the use of the term "dispatch" in draft article 2 would be more appropriate to align draft article 2 with the aforementioned instruments. Others questioned the appropriateness of the proposed language.

21. In relation to paragraph 2, the view was expressed that that provision should be augmented to deal with the situation where the addressee would refuse to take delivery or receive a notice as it was not viewed as covering that situation.

22. Support was expressed for draft article 2, as it appeared in document A/CN.9/WG.II/WP.157, which was said to follow more closely the language of the 1976 version of that article in the Rules.

23. The Committee considered the following proposal for draft article 2:

> "1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.
>
> "2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.
>
> "3. In the absence of such designation or authorization, a notice is:
>
> "(a) Received if it is physically delivered to the addressee; or

[5] United Nations publication, Sales No. E.99.V.4.

[6] United Nations publication, Sales No. E.07.V.2.

"(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

"4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

"5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4.

"6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

24. General support was expressed for the substance of the proposal. With a view to clarifying the time of delivery where transmission took place by means of electronic communication, the following proposal was made for a possible addition to paragraph 5: "A notice transmitted by electronic means is deemed to have been received on the day it is transmitted." Views expressed earlier in the discussion regarding the possible need to ensure consistency between the revised Rules and other UNCITRAL standards dealing with issues of electronic communication were reiterated. More generally, the discussion focused on whether all notices under the Rules should rely on a receipt or on a dispatch rule. The question whether a specific rule should be designed for the notice of arbitration was also discussed. Support was expressed for a rule under which electronic communication should be deemed to have been received on the day when it was sent. It was generally acknowledged that a rule relying on deemed receipt at the time when notification reached the addressee's electronic address would be more consistent with other UNCITRAL texts and thus more conducive to the promotion of electronic communication in international arbitration. However, concern was expressed that, in daily arbitration practice, requiring a sender of an electronic notice to confirm the date of delivery to the addressee's address before being able to calculate time periods for the parties' further obligations in the arbitration (pursuant to draft art. 2, para. 6) could be excessively burdensome, whereas the date of sending could be readily ascertained. In that regard, it was noted that paragraph 5 only pertains to the question as to *when* a notice sent by electronic means is deemed received. The question *whether* it is deemed received is governed by paragraph 2, which conditions deemed receipt upon delivery of the notice to the address. It was therefore said that it remained open to a non-sending party to object that a particular notice, even if electronically sent to that party's address at an identified time, was in fact not delivered (and thus could not in the end be "deemed received"). The view was expressed that draft article 2 should be reflective of a practice where reliance on electronic communication was still limited.

25. After discussion, the Committee adopted the following wording to be inserted at the end of paragraph 5: "A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address."

26. It was clarified that the words "specifically for this purpose" in paragraph 2 following the words "designated by a party" should be understood as also including the indication of addresses for general notices in contracts that contained or referred to the arbitration agreement.

27. The Committee confirmed its understanding that the first sentence of paragraph 6 was to be understood as encompassing both actual and deemed receipt of a notice.

28. After discussion, the Committee adopted the substance of draft article 2 as contained in paragraphs 23 and 25 above.

Notice of arbitration

Draft article 3

29. For the sake of consistency with the provisions of draft article 2, the Committee agreed to replace the word "give" appearing before the words "to the other party" in paragraph 1 with the word "communicate". With that modification, the Committee adopted the substance of draft article 3.

Response to the notice of arbitration

Draft article 4

30. The Committee recalled that the purpose of draft article 4 was to provide the respondent with an opportunity to state its position before the constitution of the arbitral tribunal by responding to the notice of arbitration, and to clarify at an early stage of the procedure the main issues raised by the dispute.

Paragraph 1

31. It was observed that the 30-day time period for the communication of the response to the notice of arbitration might be too short in certain cases, in particular in complex arbitration or arbitration involving entities such as States or intergovernmental organizations.

32. In that context, it was pointed out that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might affect the ability of such organizations to take action within such time periods.

33. It was said that lengthening the time period for the communication of the response to the notice of arbitration would not be a satisfactory solution in relation to purely commercial arbitration between private parties. It was proposed that the concerns raised in relation to arbitration involving States or intergovernmental organizations or complex arbitration could be dealt with by adding language to the effect that the response to the notice of arbitration should be given "as far as

possible" within 30 days. Another proposal was made to provide that the response to the notice of arbitration was only indicative.

34. Those proposals were objected to on the grounds that, in practice, the notice of arbitration and the response thereto were aimed at clarifying outstanding issues, and that goal might not be reached if the time limit for the communication of response to the notice of arbitration was not mandatory.

35. It was said that the response to the notice of arbitration dealt mainly with two types of issue, one relating to the response to the claim and the other to the composition of the arbitral tribunal. It was said that only the first type of issue was a novelty introduced by draft article 4, compared with the 1976 version of the Rules. In addition, it was pointed out that draft article 30, paragraph 1 (b), already provided that a failure by the respondent to communicate its response to the notice of arbitration should not be treated by the arbitral tribunal as an admission of the claimant's allegations.

36. The Committee agreed that the response to the notice of arbitration was not intended to limit the right of the respondent to respond on the merits of the case at a later stage of the procedure, in particular in its statement of defence as provided in draft article 21. It was further said that the concerns raised in relation to the time period for the communication of the response to the notice of arbitration could be dealt with in practice, by the respondent either requesting an extension of time, or emphasizing the provisional nature of its response.

37. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

38. As a matter of drafting, the Committee agreed to add the words "to be" before the word "constituted" in paragraph 2 (a) and, with that modification, the Committee adopted the substance of paragraph 2.

Paragraph 3

39. The Committee adopted the substance of paragraph 3 without modification.

Representation and assistance

Draft article 5

40. A proposal was made to modify the second sentence of draft article 5 along the lines of: "The credentials of such persons (representatives) must be certified in due form in accordance with the private law of the country of arbitration, and their names and addresses must be communicated to all parties and to the arbitral tribunal." That proposal did not receive support.

41. The Committee adopted the substance of draft article 5 without modification.

Designating and appointing authorities

Draft article 6

42. The Committee considered draft article 6, which dealt with designating and appointing authorities. That provision reflected the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances currently provided for in the Rules. It also sought to clarify the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.

Paragraph 1

43. The question was raised whether the Secretary-General of the PCA should be mentioned in the Rules as one example of who could serve as appointing authority. It was proposed to delete the words "including the Secretary-General of the PCA" in paragraph 1. The proposal did not receive support.

44. It was further suggested that the functions of the Secretary-General of the PCA should be expressly limited under the Rules to those of a designating authority. In response to that suggestion, it was pointed out that there were instances in which the Secretary-General of the PCA had acted also as an appointing authority under the Rules. It was also said that that suggestion, if accepted, would run contrary to that existing practice and entail the risk of invalidating arbitration agreements designating the Secretary-General of the PCA as an appointing authority.

45. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3

46. It was stated that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might affect the ability of such organizations to designate an appointing authority within the time period established under paragraph 2 to take action.

47. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

48. The Committee noted that paragraph 4 did not deal with the consequences attached to a failure to act of an appointing authority in case of challenge of an arbitrator. Since no time limit had been set for an appointing authority to decide on a challenge under draft article 13, that occurrence did not fall under any of the instances listed in paragraph 4. To address that concern, it was proposed to amend the first sentence of paragraph 4 as follows: "If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party' s request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority". That proposal was adopted by the Committee.

49. The Committee agreed that, for the sake of clarity, the functions of the Secretary-General of the PCA in relation to the review of fees and expenses of arbitrators should be dealt with under draft article 41, paragraph 4. Consequently, the Committee agreed to delete the last sentence of paragraph 4 and to include the words "Except as referred to in article 41, paragraph 4," as the opening words of draft article 6, paragraph 4.

50. The Committee adopted the substance of paragraph 4 with the modifications referred to in paragraphs 48 and 49 above.

Paragraphs 5-7

51. The Committee adopted the substance of paragraphs 5-7 without modification.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Draft article 7

52. The Committee took note of a proposal to the effect that the single arbitrator who would be designated unless the parties had decided otherwise would be entitled, at the request of any of the parties, to determine that the arbitral tribunal should be composed of three arbitrators (see A/CN.9/704/Add.6). No support was expressed for that proposal.

53. The Committee adopted the substance of draft article 7 without modification.

Appointment of arbitrators (draft articles 8-10)

Draft article 8

54. The Committee adopted the substance of draft article 8 without modification.

Draft article 9

Paragraph 1

55. It was said that draft article 9, paragraph 1, did not provide for the possibility of consultation between the arbitrators and the parties prior to choosing the presiding arbitrator. In order to avoid draft article 9 being construed as precluding such consultation, which was said to occur in practice, it was proposed to amend the second sentence of draft article 9, paragraph 1, as follows: "The two arbitrators thus appointed shall, after consultation with the parties should the arbitrators so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal."

56. The need to amend paragraph 1 as proposed was questioned. It was said that, while consultations occurred in practice, international arbitral institutions did not provide in the text of their arbitration rules for such consultations. It was also suggested that, before adding such language, more precision was required as to how the arbitrators would carry out such consultations. In response to concern that such consultations between parties and arbitrators could create issues with regard to the duty of impartiality and independence of the arbitrators, the Committee agreed that

such consultations should not be considered an infringement of that duty. It was further pointed out that codes of ethics for arbitrators, such as the IBA Rules of Ethics for International Arbitrators[7] or the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes[8] provided in substance that in arbitrations in which the two party-appointed arbitrators were expected to appoint the third arbitrator, each party-appointed arbitrator might consult with the party who appointed him or her concerning the choice of the third arbitrator.

57. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

58. The Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

59. It was pointed out that paragraph 3 (pursuant to which the presiding arbitrator was to be appointed in the same way as a sole arbitrator would be appointed under draft article 8, paragraph 2), appropriately referred to "article 8, paragraph 2". In order to capture in draft article 9, paragraph 3, also the important rule of draft article 8, paragraph 1, according to which the appointing authority should act "at the request of a party", it was proposed that the reference in the last sentence of draft article 9, paragraph 3, should be to article 8 and not only to article 8, paragraph 2. The proposal to delete the words ", paragraph 2" was adopted and, with that modification, the Committee adopted the substance of paragraph 3.

Draft article 10

60. It was noted that the principle in paragraph 3 that the appointing authority should appoint the entire arbitral tribunal when parties were unable to do so was an important principle, in particular in situations like the one that had given rise to the case *BKMI and Siemens v. Dutco*.[9] It was stated that the decision in the *Dutco* case had been based on the requirement that parties received equal treatment, which paragraph 3 addressed by shifting the appointment power to the appointing authority. In that light, a proposal was made to insert at the end of paragraph 3 the words "while respecting the equality of the parties".

61. The Committee agreed that party equality was one of the fundamental principles of arbitration to also be observed by the appointing authority. However, it was noted that the shifting of all appointing power to the appointing authority safeguarded the principle of equality of the parties. The Committee concluded that there was no need to add such language in the Rules.

62. After discussion, the Committee adopted the substance of draft article 10 without modification.

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[7] Available at the date of this report from www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[8] Available at the date of this report from www.abanet.org/dispute/commercial_disputes.pdf.

[9] *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue de l'Arbitrage*, 1992, p. 470).

Disclosures by and challenge of arbitrators (draft articles 11-13)

Draft article 11

63. It was proposed to include language in draft article 11 that would relieve an arbitrator of his or her obligation to disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence where those circumstances were already known to the parties. That proposal received little support. It was said that that situation was already addressed by both draft article 12, paragraph 2, which gave a party the right to challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment had been made, and draft article 13, paragraph 1, which included a time limit of 15 days for a party to challenge an arbitrator after the circumstances became known to it.

64. Another proposal was to qualify the standard of "circumstances likely to give rise to justifiable doubts" by including the words "in the view of an impartial third party" after the words "justifiable doubts". That proposal did not find support.

65. After discussion, the Committee adopted the substance of draft article 11 without modification.

Draft article 12

66. The Committee adopted the substance of draft article 12 without modification.

Draft article 13

67. With a view to limiting frivolous challenges, a proposal was made to include at the end of paragraph 2 the following words: "and, as far as possible, the documents and the evidence on which the challenge is based". Another proposal was made to require the appointing authority to state the grounds on which its decision on challenge of arbitrator was made. A further proposal was made to include the words "within a reasonable time" at the end of paragraph 4 to avoid needless prolongation of the proceedings if the appointing authority was not sufficiently responsive. Those proposals did not find support.

68. It was noted that draft article 2 provided a general rule of interpretation, according to which periods of time stipulated in the Rules "begin to run on the day following the day when a notice, notification, communication or proposal is received". It was further noted that draft article 13, paragraph 4, however, referred to the "date of the notice of challenge" rather than the date of its receipt as the starting point for the calculation of the time period. The Committee confirmed that the starting date in draft article 13, paragraph 4, was correctly stated for the purposes of draft article 13, paragraph 4.

69. The Committee adopted the substance of draft article 13 without modification.

Replacement of an arbitrator

Draft article 14

70. The Committee adopted the substance of draft article 14 without modification.

Repetition of hearings in the event of the replacement of an arbitrator

Draft article 15

71. The Committee adopted the substance of draft article 15 without modification.

Exclusion of liability

Draft article 16

72. The Committee considered draft article 16, which aimed at establishing immunity for the participants in the arbitration and sought to preserve exoneration in cases where the applicable law allowed contractual exoneration from liability, to the fullest extent permitted by such law, save for intentional wrongdoing.

73. The Committee recalled that the purpose of the provision was to ensure that arbitrators were protected from the threat of potentially large claims by parties dissatisfied with arbitral tribunals' rulings or awards who might claim that such rulings or awards arose from the negligence or fault of an arbitrator. It was also recalled that a waiver "to the fullest extent permitted under the applicable law" did not and should not extend to intentional wrongdoing.

74. It was stated that the existence of liability was regulated by the applicable law and not by the agreement between the parties. The Rules, it was further said, were an agreement between the parties. Therefore, the question was raised whether draft article 16 should be amended so as to avoid creating the impression that it regulated the existence of liability, and focus instead on the allocation of its consequences between the parties.

75. It was further said that draft article 16 might give rise to differing interpretations, in particular the proviso "save for intentional wrongdoing" might be interpreted differently in various jurisdictions. Also, the view was expressed that that proviso might create the impression that the Rules created liability even if there was no such liability under the applicable law.

76. A proposal was made to address those concerns along the lines of: "The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators, ...". That proposal did not receive support. The Committee agreed that even though the liability regime differed depending on the applicable law, "intentional wrongdoing" was a concept that would be understandable to judges in different jurisdictions.

77. The Committee noted that the Secretary-General of the PCA was mentioned as being among those against whom parties would waive liability under the revised Rules. However, according to the comments of the Court, it already enjoyed immunity against legal process under various agreements and international conventions. The Committee agreed to delete the words "the Secretary-General of the PCA" in draft article 16 for the reason that a specific waiver under the revised Rules was unnecessary for the Court.

78. After discussion, the Committee adopted the substance of draft article 16 with the modification contained in paragraph 77 above.

Section III. Arbitral proceedings

General provisions

Draft article 17

Paragraph 1

79. It was noted that the Working Group had agreed to delete the word "full" that appeared before the word "opportunity" in article 15, paragraph 1, of the 1976 version of the Rules (corresponding to draft article 17, paragraph 1), in recognition of the fact that the phrase "a full opportunity" could be invoked to delay proceedings or otherwise misused and that it might be more appropriate simply to refer to "an opportunity".

80. A suggestion was made to include the word "reasonable" or "adequate" before the word "opportunity" in paragraph 1. Objections were made to that suggestion on the ground that it might be interpreted as weakening the ability of parties to present their case. It was also pointed out that the word "opportunity" appeared under various provisions of the Rules and the use of the word "reasonable" before the word "opportunity" in draft article 17, paragraph 1, would create a discrepancy with those other provisions.

81. Strong support was expressed for the inclusion of the word "reasonable" before the word "opportunity" on the ground that it corresponded to a commonly used and well-accepted standard.

82. After discussion, the Committee agreed to replace the word "an" appearing before the word "opportunity" in the first sentence of paragraph 1 with the words "a reasonable". The Committee adopted the substance of paragraph 1 with that modification.

Paragraph 2

83. It was noted that paragraph 2 provided for the power of the arbitral tribunal to change "any period of time". A suggestion was made to except from that power extension of the period of time for issuing an award, as certain domestic legislation prohibited any such extension. Accordingly, it was suggested to add at the end of paragraph 2 the words "provided that this does not include the power to alter the period of time for issuing the award". That suggestion did not receive support. It was explained that draft article 1, paragraph 3, of the Rules contained a general reservation stating that the Rules might not derogate from mandatory provisions of the law applicable to the arbitration, and that provision appropriately addressed that concern.

84. After discussion, the Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

85. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

86. A proposal was made to place the provision of paragraph 4, which dealt with all communications, as a new paragraph of draft article 2. It was further proposed to delete from draft articles 20, paragraph 1, 21, paragraph 1, 37, paragraph 1, and 38, paragraph 1, the notification requirement they contained since draft article 17, paragraph 4, it was said, already addressed the matter. Those proposals did not receive support.

87. The Committee considered paragraph 4 in the light of its decision to delete draft article 26, paragraph 9 (see paras. 121-125 below). In order to preserve the possibility for a party to apply to the arbitral tribunal for a preliminary order, it was proposed to modify draft article 17, paragraph 4, as follows:

> "All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties except if delayed communication to the other party is necessary so that the arbitral tribunal can consider, when it is otherwise authorized to do so, a party's request that it issue a preliminary order directing the other party not to frustrate the purpose of a requested interim measure while the tribunal considers that request."

88. It was pointed out that there were other instances where communications by a party could not be sent at the same time to the other parties. An example was the situation where arbitral institutions required that all communications be sent through them. With the aim of adopting a broader approach to possible exceptions to the requirement of simultaneous communication, a proposal was made to delete the words "at the same time" from paragraph 4. An alternative proposal was made to amend paragraph 4 as follows:

> "All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except as otherwise permitted by the arbitral tribunal."

89. The alternative proposal received support. It was proposed to add at the end of the alternative proposal the words "or by applicable law". That proposal received some support, as it was seen as a safeguard and a limit to the possibility for delayed communications.

90. However, it was suggested that that inclusion might import in the Rules application of domestic law principles that might not be desirable, in particular in those instances where the laws did not contain limitations to delayed communications.

91. In order to avoid any ambiguity as to the fact that the exception applied only to the timing of communication, it was suggested to divide the alternative proposal into two sentences along the lines of:

> "All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Except as otherwise permitted by the arbitral tribunal, all such communications shall be made at the same time."

92. In response to concerns expressed by a few delegations on the alternative proposal, it was stated that the alternative proposal was not meant to affect the question whether an arbitral tribunal was authorized to issue orders without hearing

parties. In that respect, one delegation recalled that draft article 17, paragraph 1, required the arbitral tribunal to treat the parties with equality and to provide a fair and efficient process for resolving their dispute. With a view to clarifying that the Rules remained neutral by reference to applicable law as to whether the arbitral tribunal had the power to permit delayed communications, a suggestion was made to amend the second sentence of the alternative proposal so that paragraph 4 would read as follows:

> "All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law."

The Committee adopted that suggestion.

93. The Committee adopted the substance of paragraph 4 as it appeared in paragraph 92 above.

Paragraph 5

94. The Committee considered paragraph 5, which allowed the arbitral tribunal to join a third party in the arbitration, under certain circumstances. It was pointed out that paragraph 5 provided that if a joinder would prejudice any of the parties, the provision gave the tribunal the possibility to deny it. It was said that joining a third person might deprive that person of its right to participate in the constitution of the arbitral tribunal. In that respect, it was clarified that the possible impact of the joinder on the validity or the enforceability of the award was a matter to be taken into account by the arbitral tribunal when assessing whether the joinder would cause prejudice to any of the parties.

95. After discussion, the Committee adopted the substance of paragraph 5 without modification.

Place of arbitration

Draft article 18

96. It was said that draft article 18, paragraph 1, of the Rules stated that "the award shall be deemed to have been made at the place of arbitration", and it was clarified that when the Rules were used by intergovernmental organizations, including the United Nations and its subsidiary organs, the reference to the place of arbitration should not be interpreted as a waiver of the organizations' privileges and immunities. It was said that the United Nations and its subsidiary organs were not subject to local laws, including procedural laws concerning the conduct of the arbitration proceedings.

97. The Committee confirmed the decision made by the Working Group to retain the phrase "place of arbitration", and adopted the substance of draft article 18 without modification.

Language

Draft article 19

98. The Committee adopted the substance of draft article 19 without modification.

Statement of claim

Draft article 20

Paragraph 1

99. As a matter of drafting, it was proposed to add the words "referred to" in the second sentence of paragraph 1 before the words "in article 3". That proposal was adopted by the Committee and, with that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

100. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

101. A suggestion was made to complement paragraph 4 with a text providing that in case documents could not be submitted with the statement of claim, the statement of claim should provide explanation and an indication as to when the missing document could be made available. That suggestion did not receive support as it was considered overregulating the matter.

102. The Committee adopted the substance of paragraph 4 without modification.

Statement of defence

Draft article 21

Paragraph 1

103. As a matter of drafting, the Committee agreed to include the words "referred to" before the reference to "article 4" in the second sentence of draft article 21, paragraph 1. With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

104. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

105. It was noted that paragraph 4 provided that draft article 20, paragraphs 2 and 4, applied to a counterclaim and a claim relied on for the purpose of a set-off. It was suggested that a reference to draft article 20, paragraph 3, be added to cater for the situation where a counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.

106. It was also proposed to include the phrase ", a claim under article 4, paragraph 2 (f)," after the words "a counterclaim", in order to address the situation in which a respondent would have formulated a claim against a party to the arbitration agreement other than the claimant.

107. Both proposals received broad support and the Committee adopted the substance of paragraph 4 with the modifications contained in paragraphs 105 and 106 above.

Amendments to the claim or defence

Draft article 22

108. The Committee adopted the substance of draft article 22 without modification.

Pleas as to the jurisdiction of the arbitral tribunal

Draft article 23

Paragraph 1

109. It was noted that the phrase "shall have the power to rule" contained in article 21, paragraph 1, of the 1976 Rules had been replaced with the words "may rule" in draft article 23 of the revised Rules, which might be interpreted as weakening the power of the arbitral tribunal with respect to decisions on its own jurisdiction. It was explained that the modification had been made for the purpose of aligning the language of the Rules with that of the UNCITRAL Model Law on International Commercial Arbitration.[10] While it was acknowledged that the words "may rule" were appropriate in the context of a legislative text, it was said that the wording of the 1976 version of the Rules should be retained as it better expressed the power granted to the arbitral tribunal under a text of a contractual nature such as the Rules. It was agreed to revert to the language in the 1976 version of the Rules and to replace in the first sentence of paragraph 1 the word "may" appearing before the word "rule" with the words "shall have the power to". With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

110. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Further written statements

Draft article 24

111. It was clarified that draft article 24, which dealt with further written statements that might be required from the parties, was meant to be a provision of a general nature and to include the possibility for the arbitral tribunal to require a response by the claimant to a counterclaim or claim for the purpose of a set-off.

112. The Committee adopted the substance of draft article 24 without modification.

[10] See article 16, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (United Nations publication, Sales No. E.08.V.4).

Periods of time

Draft article 25

113. It was said that the possibility for the arbitral tribunal to extend time limits provided for in the second sentence of draft article 25 if it considered that an extension was justified defeated the purpose of the first sentence of that provision, which was to determine a maximum time limit of 45 days for the communication of written statements. Therefore, it was proposed to also provide for a time limit with respect to extension of time limits that might be decided by the arbitral tribunal. That proposal did not receive support.

114. The Committee adopted the substance of draft article 25 without modification.

Interim measures

Draft article 26

Paragraph 1

115. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

116. As a matter of drafting, it was agreed to replace the words "to, including, without limitation:" appearing in the chapeau of paragraph 2 with the words ", for example and without limitation, to:".

117. With respect to paragraph 2 (c), which allowed the arbitral tribunal to order a party to provide a means of preserving assets out of which a subsequent award might be satisfied, it was said that the property and assets of the United Nations were immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action pursuant to article II, section 3, of the Convention on the Privileges and Immunities of the United Nations.[11] It was further said that such immunity was absolute and might not be disposed of by any court or tribunal. In that regard, it was clarified that paragraph 2 (c) was not intended to affect the regime of privileges and immunities of the United Nations.

118. With regard to state entities, a proposal was made to add to paragraph 2 (c) wording along the lines of: "nothing regarding that paragraph should be construed as derogating from the law on state immunity from execution". A proposal was made to include a general provision to the effect that nothing in the Rules should be implied as a waiver of state immunities. After discussion, the Committee agreed that such addition to paragraph 2 (c) was not appropriate in view of the generic nature of the Rules. It was also said to be unnecessary as nothing in the Rules was intended to affect the system of immunities and privileges of States and state entities.

119. After discussion, the Committee adopted the substance of paragraph 2 with the modification referred to in paragraph 116 above.

[11] General Assembly resolution 22 A (I).

Paragraphs 3-8

120. The Committee adopted the substance of paragraphs 3-8 without modification.

Paragraph 9

121. The Committee recalled that, pursuant to chapter IV A of the Model Law on Arbitration with amendments as adopted in 2006,[12] preliminary orders might be granted by an arbitral tribunal upon request by a party, without prior notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. The Committee further recalled the extensive discussions in the Working Group that had resulted in the adoption of paragraph 9. It was recalled that there were diverging views in the Working Group with respect to preliminary orders.

122. It was explained that the Working Group had agreed to the inclusion of paragraph 9 on the basis that it clarified that it would not be possible for an arbitral tribunal to grant preliminary orders in legal systems that did not allow them and that the power to grant preliminary orders had to be found outside these Rules. It was further explained that the text of draft paragraph 9 had been initially drafted for insertion in explanatory material accompanying the Rules.

123. It was suggested to delete paragraph 9 on the basis that its drafting was unclear, did not provide a rule and was unnecessary.

124. In support of retaining paragraph 9, it was stated that paragraph 9 reflected existing practice and promoted a neutral approach to the question of preliminary orders. It was also pointed out that draft article 17, paragraph 4, which required that all communications to the arbitral tribunal by one party be at the same time communicated to all other parties, contained a reference to draft article 26, paragraph 9 (see para. 93 above). It was stated that deletion of paragraph 9 would disassemble a carefully crafted compromise, which was seen as reconciling the diverging views expressed in the Working Group on the question of preliminary orders.

125. After discussion, the Committee agreed to delete paragraph 9.

Paragraph 10

126. The Committee adopted the substance of paragraph 10 without modification.

Evidence

Draft article 27

127. In response to a suggestion to include in draft article 27 a provision regarding the possibility of cross-examining witnesses, it was clarified that there were no restrictions under draft article 27 as to the manner in which witnesses might be examined. That suggestion did not receive support.

[12] United Nations publication, Sales No. E.08.V.4.

128. After discussion, the Committee adopted the substance of draft article 27 without modification.

Hearings

Draft article 28

Paragraphs 1-3

129. The Committee adopted the substance of paragraphs 1-3 without modification.

Paragraph 4

130. A suggestion was made to add language at the end of paragraph 4 to clarify that examination of witnesses or experts in a manner that would not require their physical presence should be justified by specific circumstances. In response to that suggestion, it was said that it might not be appropriate to provide for such a restriction in the light of technological developments in the field of communication.

131. After discussion, the Committee adopted the substance of paragraph 4 without modification.

Experts appointed by the arbitral tribunal

Draft article 29

132. The Committee adopted the substance of draft article 29 without modification.

Default

Draft article 30

133. In response to a question whether there could be any inconsistency between draft article 30, paragraph 1 (b), and draft article 32, it was explained that those two provisions dealt with different matters: draft article 30, paragraph 1 (b), addressed matters pertaining to the substance of the case, whereas draft article 32 related to matters of a procedural nature.

134. The Committee adopted the substance of draft article 30 without modification.

Closure of hearings

Draft article 31

135. In paragraph 1, a drafting suggestion was made to replace the word "or" appearing before the word "witnesses" with the word "including", as witnesses were a mode of proof. That proposal did not receive support.

136. The Committee adopted the substance of draft article 31 without modification.

Waiver of right to object

Draft article 32

137. The Committee adopted the substance of draft article 32 without modification.

Section IV. The award

Decisions

Draft article 33

138. It was suggested to modify draft article 33 to the effect that, in the absence of a majority, the award could be made by the presiding arbitrator alone. In response, the Committee recalled the extensive discussion in the Working Group that had led to the current text of the provision. Since the proposed change continued to provoke a division of opinion, it was not agreed to.

139. After discussion, the Committee adopted the substance of draft article 33 without modification.

Form and effect of the award

Draft article 34

Paragraph 1

140. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

141. The Committee considered paragraph 2 and noted that it was one of the provisions on which the Working Group did not reach agreement during the third reading of the draft revised Rules.

142. The Committee adopted the substance of the first two sentences of paragraph 2. The discussion focused on the third sentence, which contained a waiver to recourse.

143. While some support was expressed for spelling out the recourses that were excluded from the scope of the waiver, it was also felt that the language proposed might create ambiguity regarding the scope of the waiver, in particular with regard to whether the waiver encompassed the ability to resist enforcement of an award. It was proposed to replace the third sentence of paragraph 2 with a formulation along the lines of rule 28, paragraph 6, of the Rules of Arbitration of the International Chamber of Commerce (ICC)[13] or rule 26.9 of the Arbitration Rules of the London Court of International Arbitration (LCIA),[14] which provided in substance that the parties waived their rights insofar as such waiver could validly be made, without defining the specific recourses waived.

144. It was also said that it would not be possible to accurately list the exceptions to the waiver as proposed in paragraph 2, as such list would have to cover all forms of recourse that might not be waived in all legal systems. Following that approach, a proposal was made to amend the third sentence of paragraph 2 as follows: "Insofar as they may validly do so by adopting these Rules, the parties waive their right to

[13] Available at the date of this report from www.iccwbo.org/court/arbitration/id4093/index.html.

[14] Available at the date of this report from www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.

any form of appeal or review of an award to any court or other competent authority."

145. The concern was expressed that a general waiver without any qualifications might be ineffective and would not provide sufficient guidance to the parties. Parties might not be aware that certain forms of recourse could not be waived in most legal systems. In the few systems where a waiver was possible, various requirements had to be met for the waiver to be valid, depending on the applicable law. An alternative proposal was made to modify the third sentence of paragraph 2 as follows: "The parties waive their right to any form of appeal, review or recourse against an award to any court or other competent authority that may be waived under the applicable law, and the waiver of which does not require a specific agreement."

146. Another concern was expressed regarding the consequence that such a general waiver might entail for the privileges and immunities of sovereign entities or intergovernmental organizations when using the UNCITRAL Arbitration Rules. It was pointed out that the provision on waiver of recourses should not be deemed a waiver, express or implied, of any of the privileges and immunities of sovereign entities or of intergovernmental organizations, including the United Nations and its subsidiary organs.

147. In view of the difficulties in properly defining the limits of the waiver, and on the basis that that matter should be left to be addressed by applicable law, a proposal was made to delete the third sentence from paragraph 2 and to place its substance in an annex to the Rules, following the draft model arbitration clause for contracts. That proposal was adopted by the Committee with the waiver statement reading as follows: "The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law."

148. It was further proposed to include the waiver statement under the draft model arbitration clause for contracts, as an additional item that the parties should consider adding. In support of that approach, it was said that such a waiver provision in the model arbitration clause would be a useful reminder for the parties to explicitly waive recourses. However, it was said that the matters listed under the model arbitration clause related to basic procedural aspects, such as the number of arbitrators, place of arbitration and language. It was pointed out that the waiver statement was of a different nature, and it would be useful to provide some guidance to the parties on the effect of that statement and its interplay with applicable laws.

149. Therefore, it was proposed to place the waiver statement following the draft model arbitration clause with the heading "Possible waiver statement" and to add a note before the waiver statement along the lines of: "If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering however that the effectiveness and conditions of such an exclusion depend on the applicable law." Support was expressed for that proposal.

150. Concern was expressed that not including the waiver in the model arbitration clause might diminish its importance for the users of the Rules. In response, it was said that both the waiver and the model arbitration clause were placed in the annex to the Rules and thus both were optional to the parties.

151. After discussion, the Committee agreed to delete the third sentence of paragraph 2 and to include the "possible waiver statement" following the draft model arbitration clause in the annex to the Rules as provided for in paragraphs 147 and 149 above.

Paragraphs 3-6

152. With respect to paragraph 5, which regulated conditions of publication of an award, it was said that as a means of ensuring the adequate protection of the privileges and immunities of the United Nations, including its subsidiary organs, the Organization generally provided that, when required by law, a third party was allowed to disclose certain information pertaining to the United Nations, subject to and without any waiver of the privileges and immunities of the United Nations. For that reason, third parties were generally required to give the United Nations sufficient prior notice of a request for the disclosure of such information in order to allow the United Nations to take protective measures or such other action as might be appropriate before any such disclosure was made. It was clarified that paragraph 5 should not be interpreted as a limitation on the United Nations ability to impose restrictions on the disclosure of information against its privileges and immunities.

153. The Committee adopted the substance of paragraphs 3-6 without modification.

Applicable law, *amiable compositeur*

Draft article 35

Paragraph 1

154. It was pointed out that the reference in the second sentence of paragraph 1 to "the law" that the arbitral tribunal determined to be appropriate in the absence of an express choice of the parties could be interpreted as excluding the arbitral tribunal's power to apply "rules of law". It was said that such an approach would differ from the solutions adopted by rules of other international arbitration institutions (such as art. 17, para. 1, of the ICC Rules, article 22.3 of the LCIA Rules or art. 33, para. 1 of the Swiss Rules of International Arbitration).[15] It was suggested to amend the second sentence of draft article 35, paragraph 1, as follows: "Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate."

155. In response, it was explained that paragraph 1 was meant to increase the parties' and the arbitral tribunal's flexibility in determining the applicable law. It was noted that, while under the corresponding provision of the 1976 version of the UNCITRAL Arbitration Rules[16] the parties were expected to choose the "law" to be applied to the merits of the dispute, under the draft revised version they would be allowed to choose "rules of law", a phrase generally understood to mean any body of rules, not necessarily emanating from a State. It was further noted that, regarding the arbitral tribunal's choice of the applicable law in case the parties had not made a choice themselves, the 1976 version of the Rules instructed the tribunal to choose

[15] Available at the date of this report from www.sccam.org/sa/en/rules.php.

[16] See article 33, paragraph 1, of the 1976 UNCITRAL Arbitration Rules.

the governing law by applying conflict-of-laws rules that it considered applicable. It was explained that the draft revised version did not mention conflict-of-laws rules, thereby enhancing flexibility. It was also said that the decision of the Working Group not to give to the arbitral tribunal the discretion to designate "rules of law" where the parties had failed to make a decision regarding the applicable law was the result of careful consideration.

156. It was also stated that, in any case, parties and the arbitral tribunal were not completely free to choose the applicable law. It was explained that the validity and enforceability of the award depended on the applicable law and on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[17] (the New York Convention). For instance, under article V of the New York Convention, an award was invalid or unenforceable if a party to the arbitration agreement was under some incapacity under its law, if the award was on a matter that was not arbitrable under the law applied by the court or if it conflicted with the public policy of the forum. It was highlighted that relevant laws regarding legal capacity, arbitrability and public policy should be taken into consideration.

157. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3

158. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Settlement or other grounds for termination

Draft article 36

159. The Committee adopted the substance of draft article 36 without modification.

Interpretation of the award

Draft article 37

160. The Committee adopted the substance of draft article 37 without modification.

Correction of the award

Draft article 38

161. The Committee adopted the substance of draft article 38 without modification.

Additional award

Draft article 39

162. The Committee adopted the substance of draft article 39 without modification.

[17] United Nations, *Treaty Series*, vol. 330, No. 4739.

Definition of costs

Draft article 40

163. It was noted that the definition of costs contained in draft article 40, paragraph 2 (f), referred to "any fees and expenses of the appointing authority", but only to "the expenses" of the Secretary-General of the PCA. It was suggested to add the word "fees" in the reference to the Secretary-General of the PCA in that paragraph. That suggestion received support and, with that modification, the Committee adopted the substance of draft article 40.

Fees and expenses of arbitrators

Draft article 41

164. The Committee considered draft article 41 and noted that paragraphs 3 and 4 had not been fully considered by the Working Group during the third reading of the draft revised Rules.

Paragraph 1

165. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

166. It was observed that the words "has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority" appearing in paragraph 2 could be deleted as they were viewed as redundant. That proposal received support. It was further proposed to replace the word "an" appearing before the words "appointing authority" at the beginning of paragraph 2 with the word "the" for the sake of clarity. Concern was expressed that those proposals would not be consistent with the fact that an appointing authority would not necessarily be designated in each case. To accommodate that concern, it was proposed to begin paragraph 2 with the words "If there is an appointing authority and it applies". That proposal received broad support. The Committee adopted the substance of paragraph 2 with the aforementioned modification.

Paragraph 3

167. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

168. As a matter of principle, the question was raised whether the cost review mechanism designed under draft article 41 should be included in the Rules, as it might be seen as introducing complexities, and might give rise to abuse by losing parties that might seek review of fees to delay enforcement of an award. It was further said that the review mechanism would only address a situation rarely occurring in practice. In response, it was said that the review mechanism included in paragraph 4 would promote confidence in arbitration, that the risk of abuse was countered by the fact that the review did not affect any determination in the award, that paragraph 4 constituted the best compromise reached after extensive discussion in the Working Group and that the review mechanism would make the Rules attractive for users.

169. After discussion, the Committee agreed on the principle of including a cost review mechanism in the Rules and turned its attention to the drafting of paragraph 4 with a view to simplifying it.

170. It was noted that the second and third sentences of paragraph 4 were not consistent as the second sentence dealt with the hypothesis of the non-existence of an appointing authority whereas the third sentence, by referring to draft article 6, paragraph 4, dealt with the situation where the appointing authority refused or failed to act. It was suggested that those words should be deleted along with the second sentence of draft article 6, paragraph 4, and that the second sentence of paragraph 4 be modified along the lines of: "Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA."

171. It was further proposed to delete the words "pursuant to article 38" at the end of paragraph 4 and to add a sentence at the end of paragraph 4 along the lines of "Article 38, paragraph 3, shall apply.", which would clarify that the adjustments to be made on the fees and expenses were not errors or omissions in the sense of draft article 38, but that the procedure of draft article 38, paragraph 3, applied.

172. After discussion, the Committee adopted the substance of paragraph 4 as follows:

> "4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;
>
> "(b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;
>
> "(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;
>
> "(d) Any such adjustments shall either be included by the tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply."

Deposit for the payment of the fee review

173. Concern was expressed that draft article 41, paragraph 4, did not provide for the payment of the costs incurred by the appointing authority or the Secretary-General of the Permanent Court of Arbitration for their review of the arbitrator's

fees and expenses. In that regard, it was proposed to include an additional paragraph following paragraph 4 along the lines of:

> "A party referring for review, under paragraph 4, the arbitral tribunal's determination of fees and expenses shall at the time of such referral deposit with the reviewing authority a sum, to be determined by the reviewing authority to cover the estimated cost of such review. Any excess amount shall be determined by the reviewing authority at the completion of the review."

Some support was expressed for the inclusion of such a provision on the ground that the payment of a deposit would deter parties from making frivolous requests for review.

174. After discussion and particularly in view of the agreed additions to paragraph 6 (see para. 177 below), the Committee agreed that it was not necessary to include a provision on a deposit for the costs of the reviewing authorities.

Paragraph 5

175. The Committee adopted the substance of paragraph 5 without modification.

Paragraph 6

176. It was said that the cost review mechanism could delay the arbitral proceedings and might go beyond the scope of a review on the costs of the arbitrators only. To address the concern that the cost review might delay the recognition and enforcement of the award, it was proposed to include a second sentence in paragraph 6 along the lines of: "If an award containing the tribunal's determination of its fees and expenses is referred for review pursuant to paragraph 4, all provisions in the award other than those that relate to the determination of fees and expenses shall, to the maximum extent authorized by applicable law, be subject to immediate recognition and enforcement."

177. That proposal received support and, with a view to simplifying its drafting, the Committee agreed to add at the end of paragraph 6 the words "; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses". With that modification, the Committee adopted the substance of paragraph 6.

Allocation of costs

Draft article 42

178. The question was raised whether the words "any other award" appearing in paragraph 2 should be replaced with the words "any other decision", so as to align the wording of that paragraph with the term used in draft article 40, paragraph 1. In response, it was explained that draft article 42 dealt with the determination of amounts that a party might have to pay to another party as a result of the decision on allocation of costs, and that decision was to be found in an award.

179. After discussion, the Committee adopted the substance of draft article 42 without modification.

Deposit of costs

Draft article 43

180. The Committee adopted the substance of draft article 43 without modification.

Placement of the draft model arbitration clause for contracts and the model statements of independence pursuant to article 11 of the Rules

181. The Committee agreed to place the draft model arbitration clause for contracts and the draft model statements of independence pursuant to article 11 of the Rules in an annex to the revised Rules and to include a reference to them in the table of contents of the revised Rules, as well as in a footnote to the corresponding articles referring to that annex.

Draft model arbitration clause for contracts

182. The Committee adopted the substance of the draft model arbitration clause for contracts without modification.

Draft model statements of independence pursuant to article 11 of the Rules

183. As a matter of drafting, the Committee agreed to delete the word "hereby" where that word appeared in the draft model statements of independence.

184. A proposal was made to include in the statements a reference to legal counsels, witnesses and experts, from which the arbitrator had to be independent. In response, it was said that such a statement would be difficult to make in relation to witnesses and experts, as they were not all known to the arbitrator at the time his or her statement would be made. Although some support was expressed for the inclusion of the legal counsels to the parties, the prevailing view was that such an inclusion might not be necessary as the statement was drafted in a broad manner, encompassing all circumstances likely to give rise to doubts as to the impartiality or independence of the arbitrators.

185. After discussion, the Committee adopted the substance of the draft statements of independence pursuant to article 11 of the Rules with the deletion of the word "hereby" where it appeared in the draft statements.

Note on a statement of availability of the arbitrator

186. It was also observed that the note on a statement of availability could be either requested by the parties or made by the arbitrator on his or her own motion. The Committee adopted the note on the draft statement on the availability of the arbitrator with the following modification to its chapeau: "Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:".

C. Adoption of the UNCITRAL Arbitration Rules as revised in 2010

187. At its 910th meeting, on 25 June 2010, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report (see paras. 16-186 above). After considering the text of the draft revised Arbitration

Rules (reproduced in annex I to this report), the Commission adopted the following decision:

"*The United Nations Commission on International Trade Law*,

"*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

"*Recalling* General Assembly resolution 31/98 of 15 December 1976 recommending the use of the UNCITRAL Arbitration Rules,[18]

"*Recognizing* the value of arbitration as a method of settling disputes that may arise in the context of international commercial relations,

"*Noting* that the UNCITRAL Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

"*Recognizing* the need for revising the UNCITRAL Arbitration Rules to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice,

"*Believing* that the UNCITRAL Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules,

"*Convinced* that the revision of the UNCITRAL Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations,

"*Noting* that the preparation of the UNCITRAL Arbitration Rules as revised in 2010 was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes,

"*Expressing* its appreciation to Working Group II (Arbitration and Conciliation) for formulating the UNCITRAL Arbitration Rules as revised in 2010,

"1. *Adopts* the UNCITRAL Arbitration Rules as revised in 2010 as they appear in annex I to the present report;

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[18] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), chap. V, sect. C.

"2. *Recommends* the use of the UNCITRAL Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations;

"3. *Requests* the Secretary-General to make all efforts to ensure that the UNCITRAL Arbitration Rules as revised in 2010 become generally known and available."

D. Possible recommendations to arbitral institutions and other interested bodies

188. The Commission had before it a note by the Secretariat on possible recommendations to arbitral institutions and other interested bodies with respect to the revised Rules (A/CN.9/705). The Commission recalled that, at its fifteenth session, in 1982, it had adopted "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules".[19] The preparation of the Recommendations had been undertaken by the Commission to facilitate the use of the 1976 UNCITRAL Arbitration Rules in administered arbitration and to deal with instances where the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules.

189. After discussion, the Commission agreed that similar recommendations to arbitral institutions and other relevant bodies should be issued with respect to the UNCITRAL Arbitration Rules as revised in 2010 in view of the extended role granted to appointing authorities. It was said that the recommendations would promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such guidelines. The Commission also agreed that the recommendations on the revised Rules should follow the same pattern as the Recommendations adopted in 1982. The Commission entrusted the Secretariat with the preparation of that document, for consideration by the Commission at a future session.

E. Future work in the field of settlement of commercial disputes

190. With respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.[20] The Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire

[19] Ibid., *Thirty-seventh Session, Supplement No. 17* and corrigenda (A/37/17 and Corr.1 and 2), paras. 74-85 and annex I.

[20] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group.

191. Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues which arose more generally in treaty-based investor-State arbitration and would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.

IV. Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property

A. Introduction

192. The Commission had before it: (a) the draft supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (A/CN.9/700 and Add.1-7)); (b) the reports of the sixteenth (Vienna, 2-6 November 2009) and seventeenth (New York, 8-12 February 2010) sessions of Working Group VI (Security Interests) (A/CN.9/685 and A/CN.9/689, respectively); (c) chapter V of the report of Working Group V (Insolvency Law) on the work of its thirty-eighth session (New York, 19-23 April 2010) (A/CN.9/691), addressing the impact of insolvency of a licensor or licensee on a security right in that party's rights under a licence agreement; and (d) a note by the Secretariat transmitting comments of international organizations on the draft supplement (A/CN.9/701).

193. At the outset, the Commission expressed its appreciation to Working Group VI (Security Interests) for its work in the development of the draft supplement, to Working Group V (Insolvency Law) for its contribution to the development of the insolvency chapter of the draft supplement and to the Secretariat for its work in coordinating this work and preparing the documents for the session. The Commission also expressed its appreciation to all the organizations that have assisted Working Group VI in its work, in particular, to WIPO and to the Permanent Bureau of the Hague Conference on Private International Law.

194. The Commission also noted with appreciation the publication of the *UNCITRAL Legislative Guide on Secured Transactions*[21] and a separate publication

[21] United Nations publication, Sales No. E.09.V.12; also available at the date of this report from www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf.

consisting of the terminology and recommendations of the *Guide*.[22] Both texts had been adopted by the Commission at the second part of its fortieth session (Vienna, 10-14 December 2007).[23]

B. Consideration of the draft supplement

195. With regard to the title of the supplement, the Commission agreed that it should be "UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property". It was also agreed that the notes to the Commission at the beginning of each chapter of the draft supplement, which provided information about the relevant discussion by Working Group VI, would not need to be reproduced in the final version of the supplement. The Commission gave the Secretariat the mandate to make the necessary editorial changes to ensure consistency among the various chapters of the draft supplement and between the draft supplement and the *Guide*.

1. Preface and introduction (A/CN.9/700)

196. With respect to the preface, it was agreed that:

(a) The first sentence of the third paragraph should be revised to read along the following lines: "... the Secretariat organized, with the cooperation of WIPO, a colloquium ...";

(b) In the third sentence of the fifth paragraph, after the phrase "organizations from the public and the private sector", the phrase "which attended its meetings as observers" should be added.

197. With respect to the introduction, it was agreed that:

(a) At the end of the second sentence of paragraph 1 and the first sentence of paragraph 7, the phrase "as security for credit" should be added;

(b) The last sentence of paragraph 32 should be revised to read along the following lines: "the expression 'transfer other than an outright transfer' may denote the granting of rights from a licensor to a licensee where the licensor retains some control over the use of the intellectual property";

(c) At the end of the third sentence of paragraph 41, the phrase "with the consent of the licensor, if the licence agreement provides that the rights of Company D are non-transferable" should be added;

(d) At the end of the last sentence of paragraph 41, the phrase "to determine whether company D may grant a security right" should be added;

(e) Prior to paragraph 43, a subheading "Security rights in tangible assets with respect to which intellectual property is used" should be inserted to cover examples 6 and 7;

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[22] United Nations publication, Sales No. E.09.V.13; also available at the date of this report from www.uncitral.org/pdf/english/texts/security-lg/e/Terminology-and-Recs.18-1-10.pdf.

[23] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part II, para. 100.

(f) The second and third sentences of paragraph 43 should be revised to read along the following lines: "This category of transactions, illustrated by examples 6 and 7 below, involve security rights in tangible assets. As discussed in the draft supplement, a security right in a tangible asset does not automatically extend to the intellectual property used with respect to that asset, except if otherwise agreed by parties.";

(g) The third sentence of paragraph 44 should be revised to read along the following lines: "Company F provides bank F with its trademark licence agreements evidencing its right to use the trademarks and to grant a security right in the trademarked inventory, and its obligations to the trademark owner.";

(h) At the end of the second sentence of paragraph 45, the phrase "and that it has rights to grant a security right in those jeans" should be inserted;

(i) At the end of the second sentence of paragraph 48, the reference to "licensors or licensees" having exclusive rights should be deleted, as only owners had exclusive rights.

198. Subject to those changes, the Commission adopted the substance of the preface and the introduction.

2. Chapter I. Scope of application and party autonomy (A/CN.9/700/Add.1)

199. The Commission agreed that:

(a) In subparagraph (g) dealing with patents in paragraph 11, the word "patent" should be replaced with the word "invention", as an inventor would invent the invention and not the patent;

(b) A subparagraph (h) should be added under patents in paragraph 11 to refer to "the transferability of patents and the right to grant a licence";

(c) At the end of paragraph 17, text along the following lines should be added: "A State implementing the recommendations of the Guide may wish to address this question."

200. Subject to those changes, the Commission adopted the substance of chapter I.

3. Chapter II. Creation of a security right in intellectual property (A/CN.9/700/Add.2 and recommendation 243)

201. It was agreed that paragraph 32 should be revised to refer to cars or other devices that included a copy of copyrighted software or design rights. It was also agreed that the word "product" at the end of the paragraph should be replaced with the word "component". Subject to those changes, the Commission adopted the substance of chapter II. The Commission also adopted recommendation 243 unchanged.

4. Chapter III. Effectiveness of a security right in intellectual property against third parties (A/CN.9/700/Add.3, paras. 1-9)

202. It was agreed that the fourth sentence of paragraph 9 should be revised to read along the following lines: "... a security right in intellectual property is treated as

another type of (outright or conditional) transfer ...". Subject to those changes, the Commission adopted the substance of chapter III.

5. Chapter IV. The registry system (A/CN.9/700/Add.3, paras. 10-52, and recommendation 244)

203. It was agreed that:

(a) In the fourth sentence of paragraph 13, the reference to "the Madrid Agreement concerning the International Registration of Marks (1891), the Madrid Protocol (1989)" should be deleted;

(b) After the words "For example" in the second sentence of paragraph 14, the phrase "the Madrid Agreement concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989) provides for the possibility to record a restriction of the holder's right of disposal in an international application or registration (see Form MM19 at www.wipo.int/madrid/en/forms/) and" should be inserted;

(c) Paragraph 29 should be revised to avoid unnecessarily emphasizing the fact that the general security rights registry provided less information and to clarify the advantages and disadvantages of such a general registry.

204. Subject to those changes, the Commission adopted the substance of chapter IV. The Commission also adopted recommendation 244 unchanged.

6. Chapter V. Priority of a security right in intellectual property (A/CN.9/700/Add.4 and recommendation 245)

205. The Commission agreed that the phrase in parenthesis at the end of paragraph 35 should be deleted. Subject to that change, the Commission adopted the substance of chapter V. The Commission also adopted recommendation 245 unchanged.

7. Chapter VI. Rights and obligations of the parties to a security agreement relating to intellectual property (A/CN.9/700/Add.5, paras. 1-5, and recommendation 246)

206. The Commission adopted the substance of chapter VI unchanged. The Commission also adopted recommendation 246 unchanged.

8. Chapter VII. Rights and obligations of third-party obligors in intellectual property financing transactions (A/CN.9/700/Add.5, paras. 6-7)

207. The Commission adopted the substance of chapter VII unchanged.

9. Chapter VIII. Enforcement of a security right in intellectual property (A/CN.9/700/Add.5, paras. 8-32)

208. The Commission adopted the substance of chapter VIII unchanged.

10. Chapter IX. Acquisition financing in an intellectual property context (A/CN.9/700/Add.5, paras. 33-62, and recommendation 247)

209. The Commission considered replacing the text in paragraphs 43-47 with a text that would clarify that a licensor or its secured creditor could obtain the benefits of

an acquisition security right as it could register the licence or the security right in the relevant intellectual property registry before a secured creditor of the licensee. It was stated that that result would be achieved only if registration of security rights in future intellectual property was not permitted under the relevant specialized registration regime. It was also observed that, if such advance registration was permitted, the general financier of a licensee could obtain priority over an acquisition secured creditor of the licensor. After discussion, it was agreed that, while the proposed text contained an important element that could usefully be added to the text in paragraphs 43-47, it should not replace the text in those paragraphs. The Secretariat was authorized to make the necessary editorial amendments. Subject to that change, the Commission adopted the substance of chapter IX. The Commission also adopted recommendation 247 unchanged.

11. Chapter X. Law applicable to a security right in intellectual property (A/CN.9/700/Add.6, paras. 1-54, and recommendation 248)

210. In addition to options A-D, the Commission considered the following options for recommendation 248:

"*Option E*

"248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:

"(a) The law applicable to property issues relating to whether a security right in the intellectual property may be created [, such as whether the intellectual property right exists, whether the grantor has an interest in it, and whether and to whom that interest is transferable,] is the law of the State in which the intellectual property is protected;

"(b) Subject to paragraph (a), the law applicable to the creation of a security right in intellectual property is the law of the State in which the grantor is located;

"(c) The law applicable to the effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to the effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor's insolvency representative is the law of the State in which the grantor is located; and

"(d) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located, provided that, with respect to sale or other disposition of the intellectual property, the law applicable to property issues relevant to the rights in the intellectual property created by the sale or other disposition is the law of the State in which the intellectual property is protected.

"*Option F*

"248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:

"(a) The law applicable to property issues relating to whether a security right in the intellectual property may be created and the rights in the intellectual property created by enforcement of the security right is the law of the State in which the intellectual property is protected; [such property issues include those that determine whether the intellectual property right exists, whether the grantor has an interest in it, the transferability of the intellectual property and the requirements for creating a property right in the transferee upon disposition;]

"(b) Subject to paragraph (a), the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located; and

"(c) The law applicable to effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor's insolvency representative is the law of the State in which the grantor is located.

"*Option G*

"The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the intellectual property is protected. The law should in addition provide that a security right in intellectual property may also be created under the law of the State in which the grantor is located and made effective under that law against third parties other than another secured creditor, a transferee or a licensee."

211. With respect to options E and F, which were substantially identical, it was stated that they were guided by the twin principles of accommodating the interests of secured creditors and intellectual property right holders, and of appropriately deferring to law relating to intellectual property. It was also observed that options E and F, the preparation of which was significantly aided by discussions at a meeting held in June by the European Max-Planck Group for Conflicts of Laws in Intellectual Property (CLIP), aimed at referring: (a) issues relating to the ownership and transferability of intellectual property to the law of the State in which the intellectual property was protected (*lex protectionis*); (b) the creation and enforcement of a security right in intellectual property to the law of the State in which the grantor was located; and (c) the third-party effectiveness and priority of a security right in intellectual property, with two narrowly defined exceptions, to the *lex protectionis*.

212. With respect to option E, subparagraph (d), concern was expressed that it might be unworkable to the extent that it appeared to separate enforcement issues

into two different categories and refer them to two different laws. In response, it was stated that all enforcement issues were referred to the law of the State in which the grantor was located. It was also observed that, once an enforcement sale was concluded, issues relating to the transfer (and possibly the registration of the intellectual property) would normally be subject to the *lex protectionis*.

213. With respect to option G, it was stated that it was intended to reflect an approach based essentially on the *lex protectionis*, in the sense that it referred the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property to the *lex protectionis*. However, it was also observed that option G permitted the secured creditor to create and make effective against third parties a security right in intellectual property according to the law of the State in which the grantor was located. It was explained that, as a result, that option provided for the application of the law of the State in which the grantor was located to the effectiveness of a security right in the case of the grantor's insolvency. In response to a question, it was explained that if a security right was effective as against an insolvency representative, its effectiveness had to be respected and thus no issue of priority arose.

214. It was also pointed out that option G was short and simple and thus promoted certainty and predictability with respect to the law applicable to a security right in intellectual property. In addition, it was mentioned that another advantage of option G was that it did not distinguish between types of intellectual property that could be registered in an intellectual property registry and those which could not be registered in such a registry. In response to a question, it was observed that, in the case of multiple security rights in multiple intellectual property assets protected under the laws of multiple States, under option G, there would be one law governing priority, namely the law of the State in which the relevant intellectual property asset that was subject to the competing security rights was protected.

215. While it was explained that enforcement in multiple jurisdictions was a common situation with respect to security rights in intellectual property, strong concern was expressed that referring enforcement issues in particular in the case of a security right in a portfolio of intellectual property assets protected under the law of multiple States to the laws of those jurisdictions would add complexity and cost to intellectual property financing transactions and would thus run counter to the overall objective of the *Guide* to facilitate access to secured credit at more affordable rates. The suggestion was thus made that enforcement should be referred to the law of the State in which the grantor was located. There was broad support for that suggestion.

216. After a preliminary discussion, the Commission agreed that, in view of the fact that options E-G had attracted some support and covered all the elements reflected in options B-D, the latter could be set aside. As a result, the Commission decided to focus on options A and E-G.

217. In support of option A, it was stated that it was consistent with various intellectual property conventions. In that regard, some doubt was expressed as to whether those conventions dealt with the law applicable to a security right in intellectual property. It was also observed that option A was consistent with the law in many States. In that connection, it was pointed out that option G was also an approach based on the *lex protectionis*, with the additional advantage that it allowed

the secured creditor to obtain a security right that could be created and made effective against the grantor's insolvency representative and judgement creditors under the law of the State in which the grantor was located.

218. Broad support was expressed for option G, provided that it was revised to refer enforcement issues to the law of the grantor's location. To address that point, option G was revised to read as follows:

> "The law should provide that:
>
> "(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;
>
> "(b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee; and
>
> "(c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located."

219. General support was expressed for the revised version of option G on the understanding that it: (a) was essentially based on the *lex protectionis*; (b) allowed the secured creditor to obtain a security right that could also be created and made effective against the grantor's insolvency representative and judgement creditors under the law of the State in which the grantor was located; and (c) referred enforcement issues to the law of the State in which the grantor was located.

220. One of the delegations that supported option A stated that, despite the fact that it preferred option A and in view of the overwhelming support for the revised option G, it did not wish to stand in the way of consensus and was thus prepared to accept the revised option G. That delegation added, however, that the commentary should clarify that issues relating to the ownership and transferability of intellectual property would not be affected by the proposed recommendation. It also stated that, if law relating to intellectual property had an intellectual property-specific rule that provided for a different applicable law, that rule would prevail in accordance with recommendation 4, subparagraph (b). There was general agreement that the commentary should include a statement to clarify those matters.

221. After discussion, the Commission adopted the revised option G as recommendation 248.

222. The Commission next turned to the commentary of chapter X. It was agreed that: (a) the analysis of possible approaches should be revised to reflect the Commission's adoption of revised option G and the reasons for that decision; (b) the commentary should emphasize the fact that the *Guide* did not affect the law applicable to ownership and transferability issues, drawing on the relevant text of options E and F; and (c) like any other recommendation of the *Guide* and the draft supplement, recommendation 248 was subject to recommendation 4, subparagraph (b). It was also agreed that a so-called "accommodation rule", under which a forum would equate a security right that was created and made effective under the law of the grantor's location to the closest equivalent of the security right

under the *lex protectionis*, was not necessary as the text of recommendation 248 adopted gave appropriate recognition to the *lex protectionis*.

223. Subject to the changes agreed to be made in chapter X under paragraphs 220 and 222 above, the Commission adopted the substance of chapter X.

12. Chapter XI. Transition (A/CN.9/700/Add.6, paras. 55-59)

224. The Commission adopted the substance of chapter XI unchanged.

13. Chapter XII. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement (A/CN.9/700/Add.6, paras. 60-82, and A/CN.9/691, paras. 94-98)

225. The Commission noted that Working Group V (Insolvency Law), at its thirty-eighth session (New York, 19-23 April 2010), had considered the text on automatic termination and acceleration clauses in intellectual property licence agreements referred to it by Working Group VI (Security Interests) at its sixteenth session (A/CN.9/685, para. 95; the text currently reflected in A/CN.9/700/Add.6, paras. 64-66). The Commission further noted that Working Group V had approved that text subject to the addition of the following text possibly after paragraph 64 (A/CN.9/691, paras. 94-98):

> "The commentary to the *Insolvency Guide* explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115, of the *Insolvency Guide*."

226. Subject to that change, the Commission adopted the substance of chapter XII.

C. Adoption of the UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property

227. At its 914th meeting, on 29 June 2010, the Commission adopted the following decision:

> "*The United Nations Commission on International Trade Law*,
>
> "*Recognizing* the importance of efficient secured transactions regimes in promoting access to secured credit,
>
> "*Recognizing also* the need to make secured credit more available and at lower cost to intellectual property owners and other intellectual property right holders, and thus the need to enhance the value of intellectual property rights as security for credit,
>
> "*Noting* that the *UNCITRAL Legislative Guide on Secured Transactions* generally applies to security rights in intellectual property, without

inadvertently interfering with the basic rules and objectives of law relating to intellectual property,

"*Taking into account* the need to address the interaction between secured transactions law and law relating to intellectual property at both national and international levels,

"*Recognizing* that States would need guidance as to how the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* would apply in an intellectual property context and as to the adjustments that need to be made in their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property,

"*Noting further* the importance of balancing the interests of all stakeholders, including grantors, whether they are owners, licensors or licensees of intellectual property, and secured creditors,

"*Noting with satisfaction* that the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property is consistent with the *UNCITRAL Legislative Guide on Insolvency Law*[24] with regard to the treatment of the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement,

"*Expressing* its appreciation to international intergovernmental and non-governmental organizations active in the fields of secured transactions law and law relating to intellectual property, in particular, the World Intellectual Property Organization and the Hague Conference on Private International Law, for their participation in and support for the development of the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property,

"*Expressing* its appreciation to the participants of Working Group VI (Security Interests), as well as to the Secretariat, for their contribution to the development of the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property,

"1. *Adopts* the Supplement under the title "UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property", consisting of the text contained in documents A/CN.9/700 and Add.1-7, with the amendments adopted by the Commission at its forty-third session, and authorizes the Secretariat to edit and finalize the text of the Supplement pursuant to the deliberations of the Commission at that session;

"2. *Requests* the Secretary-General to disseminate broadly the text of the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property, transmitting it to Governments and other interested bodies, in both the fields of secured financing and intellectual property;

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[24] United Nations publication, Sales No. E.05.V.10.

"3. *Recommends* that all States utilize the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property, to assess the economic efficiency of their secured transactions regimes as well as their intellectual property regimes and give favourable consideration to the Supplement when revising or adopting legislation relevant to secured transactions and intellectual property, and invites States that have used the *Guide* and the Supplement to advise the Commission accordingly."

V. Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency

A. Consideration of draft part three of the UNCITRAL Legislative Guide on Insolvency Law

228. The Commission recalled that, at its thirty-ninth session, in 2006, it had referred the topic of the treatment of corporate groups in insolvency to Working Group V (Insolvency Law) for consideration.[25] The term "corporate groups" was subsequently replaced with the term "enterprise groups" (see A/CN.9/622, paras. 77-84, and A/CN.9/643). The Commission also recalled that, at its forty-second session, in 2009, it had taken note of the close connection between the work on the international treatment of enterprise groups and both the *UNCITRAL Model Law on Cross-Border Insolvency*[26] and the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*[27] and had emphasized the need to ensure consistency with those two texts. The Commission further recalled that, at that session, it had noted that the text resulting from the work on enterprise groups should form part three of the *UNCITRAL Legislative Guide on Insolvency Law* and adopt the same format, that is, recommendations and commentary.[28]

229. The Commission noted that the Working Group had agreed at its thirty-seventh session (Vienna, 9-13 November 2009) that the draft of part three (as set forth in documents A/CN.9/WG.V/WP.90 and Add.1) should be circulated to Governments in sufficient time for comment and for compilation of those comments for the forty-third session of the Commission (A/CN.9/686, para. 125).

230. The Commission had before it the revised draft of part three (A/CN.9/WG.V/WP.92 and Add.1), which the Working Group had approved at its thirty-eighth session (New York, 19-23 April 2010), the comments by Governments and international organizations on draft part three (A/CN.9/699 and Add.1-4), the reports of the thirty-seventh and thirty-eighth sessions of the Working Group (A/CN.9/686 and A/CN.9/691, respectively) and a note by the Secretariat on the

[25] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 209.

[26] United Nations publication, Sales No. E.99.V.3.

[27] United Nations publication, Sales No. E.10.V.6.

[28] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 303 and 304.

revision of draft part three as agreed by the Working Group at its thirty-eighth session (A/CN.9/708).

231. The Commission considered the domestic and international treatment of enterprise groups in insolvency as set forth in the documents noted in paragraph 230 above and adopted the commentary and recommendations with the following modifications:

(a) With respect to draft recommendations 242 and 248, the Commission agreed to include the words "to facilitate coordination of those proceedings" at the end of both draft recommendations;

(b) With respect to draft recommendation 244, paragraph (c), the Commission agreed to delete the words "and claims" following the words "substantive rights", to align it with draft recommendation 243, paragraph (f).

232. With respect to paragraph 28 of document A/CN.9/WG.V/WP.92/Add.1 on recording of the communication by courts as part of the record, it was suggested that the word "may" appearing in the second sentence should be replaced with the word "should", as the inclusion of the transcript in the record was seen as a mandatory consequence of the recording and the transcribing of the communication. In response, it was widely felt that the language should be kept as wide as possible, in order to maintain flexibility. The Commission agreed to retain the paragraph as drafted.

B. Decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law

233. At its 918th meeting, on 1 July 2010, the Commission adopted the following decision:

"*The United Nations Commission on International Trade Law*,

"*Recognizing* that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

"*Noting* that because the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, the formation of enterprise groups is a feature of the increasingly globalized world economy and thus significant to international trade and commerce,

"*Recognizing* that where the business of an enterprise group fails, it is important not only to know how the group will be treated in insolvency proceedings, but also to ensure that that treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

"*Being aware* that very few States recognize an enterprise group as a legal entity, except in limited ways for specific purposes and that very few, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency,

"*Noting* that while the *UNCITRAL Legislative Guide on Insolvency Law* provides a sound basis for the unification of insolvency law and forms key

elements of a modern commercial law framework, it does not address the insolvency of enterprise groups,

"*Recalling* the mandate given to Working Group V (Insolvency Law) to complement the *UNCITRAL Legislative Guide on Insolvency Law* with provisions concerning the treatment of enterprise groups in insolvency,

"*Appreciating* the support for and the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of an additional part of the *UNCITRAL Legislative Guide on Insolvency Law* addressing the treatment of enterprise groups in insolvency,

"*Expressing its appreciation* to Working Group V (Insolvency Law) for its work in developing part three of the *UNCITRAL Legislative Guide on Insolvency Law* on the treatment of enterprise groups in insolvency,

"1. *Adopts* part three of the *UNCITRAL Legislative Guide on Insolvency Law*, consisting of the text in documents A/CN.9/WG.V/WP.92 and Add.1, the revisions agreed by the Working Group at its thirty-eighth session (as set forth in documents A/CN.9/691 and A/CN.9/708), and the amendments adopted by the Commission at the current session, and authorizes the Secretariat to edit and finalize the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* in the light of the deliberations of the Commission;

"2. *Requests* the Secretary-General to transmit the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* to Governments and other interested bodies;

"3. *Recommends* that all States utilize the *UNCITRAL Legislative Guide on Insolvency Law* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the Guide to advise the Commission accordingly;

"4. *Recommends also* that all States continue to consider implementation of the *UNCITRAL Model Law on Cross-Border Insolvency*;

"5. *Recommends* that the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* continue to be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings."

VI. Procurement: progress report of Working Group I

234. The Commission recalled that, at its thirty-seventh session, in 2004, it had agreed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[29] would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Procurement

[29] United Nations publication, Sales No. E.98.V.13.

Law as a basis for law reform.[30] The Commission also recalled that at that session it had decided to entrust the drafting of proposals for the revision of the 1994 Model Procurement Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations.[31]

235. The Commission noted that the Working Group had begun its work at its sixth session (Vienna, 30 August-3 September 2004), since when it had held 13 one-week sessions to consider revisions to the 1994 Model Procurement Law.[32] The Commission recalled that, from its thirty-eighth session, in 2005, to its forty-first session, in 2008, it had taken note of the reports of the sixth to thirteenth sessions of the Working Group and had reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in a revised model law on public procurement (the revised model law).[33] It also recalled that, at its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Procurement Law and the Guide to Enactment, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised model law;[34] at its fortieth session, the Commission had recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work;[35] and, at its forty-first session, the Commission had invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law, together with its guide to enactment, within a reasonable time.[36]

236. The Commission further recalled that, at its forty-second session, in 2009, it had taken note of the reports of the fourteenth to sixteenth sessions of the Working Group[37] and established a Committee of the Whole to consider a draft revised model law, including the issues of defence sector procurement and the use of socio-economic factors in public procurement.[38] At that session, the Commission had also taken note of the report of the Committee of the Whole, in which the Committee in particular had concluded that the revised model law was not ready for adoption at that session of the Commission, and had requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.[39]

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[30] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

[31] Ibid., para. 82.

[32] For the reports of the Working Group on the work of its sixth to eighteenth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687 and A/CN.9/690, respectively.

[33] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 172; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192; ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170; and ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 307.

[34] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192.

[35] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170.

[36] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 307.

[37] A/CN.9/664, A/CN.9/668 and A/CN.9/672, respectively.

[38] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 11, 48 and 284.

[39] Ibid., paras. 283 and 284.

237. At its forty-third session, the Commission had before it the reports of the seventeenth (Vienna, 7-11 December 2009) and eighteenth (New York, 12-16 April 2010) sessions of the Working Group (A/CN.9/687 and A/CN.9/690, respectively). It noted that the Working Group, at those sessions, had completed a second reading of all chapters of the draft revised model law and had begun a third reading of the text. It was also noted that the Working Group had settled many of the substantive issues and requested the Secretariat to redraft certain provisions to reflect its deliberations at the sessions. The Commission further noted that the Working Group, at its eighteenth session, agreed to address the remaining outstanding issues throughout the draft revised model law with a view to finalizing the text at its nineteenth session. The Commission also noted that the Working Group had also agreed to undertake work on a draft revised guide to enactment. The Commission noted the Working Group's intention to present the draft revised model law for adoption by the Commission at its forty-fourth session, in 2011 (A/CN.9/690, paras. 156-157).

238. The Commission recalled that at its previous sessions it had called for the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law within a reasonable time (see para. 235 above). Support was expressed for the suggestion that the Commission, at its current session, should ask the Working Group to complete its work so that a draft revised model law could be submitted to the Commission's next session, in 2011, and additionally instruct the Working Group not to reopen issues on which a decision had already been taken.

239. After discussion, the Commission requested the Working Group to complete its work on the revision of the 1994 Model Procurement Law during the next two sessions of the Working Group (see para. 352 (a) below) and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken.

VII. Possible future work in the areas of electronic commerce and online dispute resolution

A. Possible future work in the area of electronic commerce

1. Introduction

240. It was recalled that, at its fortieth session, in 2007, the Commission had requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions in due course.[40]

241. At the forty-third session, the Commission had before it a note by the Secretariat (A/CN.9/692) containing an update on the progress of the work of the World Customs Organization (WCO)-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window on

[40] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

the implementation and operation of a single window facility. The note also provided information relating to electronic transferable records and an update on recent developments in the field of electronic commerce, with particular regard to identity management and electronic commerce conducted with mobile devices, including payments.

2. Electronic single window facilities

242. The Commission recalled that, at its forty-first session, in 2008, it had requested the Secretariat to engage actively in cooperation with WCO and the United Nations Centre for Trade Facilitation and Electronic Business and, with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window, and to report to the Commission on the progress of that work.[41] That request had been reiterated by the Commission at its forty-second session, in 2009.[42]

243. The Commission noted with appreciation the involvement of the Secretariat in the second meeting of the Joint Legal Task Force. The Commission took note of the decision of the Joint Legal Task Force to gather the necessary information on possible user models and cases from experts in customs procedures and to compile it for use as reference in legal analysis. With regard to the legal issues identified by the Joint Legal Task Force as suitable for further study, it was suggested that caution should be taken in dealing with issues related to enforcement as those generally fell into the realm of domestic regulatory matters.

244. After discussion, the Commission requested the Secretariat to continue its active participation in the work on single windows carried out by the Joint Legal Task Force and by other organizations, with a view to exchanging views and formulating recommendations on possible legislative work in that domain.

3. Electronic transferable records

245. It was recalled that, at its forty-second session, in 2009, the Commission had requested the Secretariat to prepare a study on electronic transferable records in the light of written proposals received at that session (documents A/CN.9/681 and Add.1 and A/CN.9/682) and to organize a colloquium on that topic, resources permitting, with a view to reconsidering those matters at a future session.[43] At the current session, the Commission was reminded that previous documents had already dealt in depth with the substantive aspects of that topic (A/CN.9/WG.IV/WP.69 and A/CN.9/WG.IV/WP.90, which had been before Working Group IV at its thirtieth and thirty-eighth sessions, respectively).

246. The Commission noted that the use of electronic communications in international trade had gained further acceptance, including with respect to the use of registries for the creation and transfer of rights. The Commission took note of a

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[41] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 333-338.

[42] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 340.

[43] Ibid., para. 343.

detailed description of the recently enacted legislation of the Republic of Korea enabling the use of electronic bills of lading based on a designated registry operator approach. In that context, the concern was expressed that any work by the Commission in the area of electronic transferable records should take a cautious approach not to deviate from or contradict other UNCITRAL texts, such as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008) (the Rotterdam Rules).[44] As an example, it was noted that the registry-based approach, reflected in the legislation of the Republic of Korea, could possibly contradict the control-based approach adopted in the Rotterdam Rules. Another view was that there was not necessarily such a conflict.

247. During the discussion, it was also suggested that work on electronic transferable records could embrace issues related to single window facilities and identity management and that it might be possible to address all those topics in a single project. However, it was also recalled that limited elements of commonality in the different records and rights transferred would not warrant immediate work at the working group level with respect to electronic transferable records.

4. Identity management

248. The Commission took note of the information contained in the note by the Secretariat (A/CN.9/692) regarding the notion of identity management system, its business model, processes and main actors as well as potential benefits. The Commission noted that identity management raised several relevant legal issues and that calls had been made for compiling a set of uniform legal rules to address such issues.

5. Use of mobile devices in electronic commerce

249. With respect to the use of mobile devices in electronic commerce, the Commission agreed that communication via mobile devices could be regarded as a subset of electronic communications as dealt with in relevant legislative standards adopted by UNCITRAL. The Commission further agreed that the predictability of the legal status of transactions conducted with mobile devices would be greatly enhanced by the adoption of appropriate legislation. In that connection, it was acknowledged that guidance on the adoption of appropriate legislative standards, with particular respect to the use of mobile devices, might be useful, in particular, in developing countries, where the broader use of mobile devices could make a significant contribution to widening access to electronic means of communication. It was also noted that payment services had been identified as an area of special importance for mobile technology and that mobile payments could support financial inclusion, especially in rural areas.

6. Decision by the Commission with respect to future work in the area of electronic commerce

250. After discussion, the Commission requested the Secretariat to convene a colloquium and possibly other informal meetings to discuss all of the above-mentioned topics. The Secretariat was requested to report to the Commission

[44] United Nations publication, Sales No. E.09.V.9.

at its next session on the results of the colloquium. The note to be prepared by the Secretariat should summarize the discussion and possibly identify a road map for future work by the Commission in the area of electronic commerce. It was agreed that that note, which would serve as a basis for discussion at the forty-fourth session of the Commission, in 2011, should provide sufficient information for the Commission to make an informed decision and to give a clearly defined mandate to a working group, if deemed appropriate.

B. Possible future work in the area of online dispute resolution in cross-border electronic commerce transactions

1. Introduction

251. It was recalled that, at its forty-second session, in 2009, the Commission had heard a recommendation that a study be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce (e-commerce) transactions, with a view to addressing the types of e-commerce dispute that might be solved by online dispute-resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute-resolution providers and the issue of enforcement of awards made through the online dispute-resolution process under the relevant international conventions.[45] The Commission had agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote e-commerce and requested the Secretariat to prepare a study on the basis of the proposals contained in document A/CN.9/681/Add.2 and to hold a colloquium on the issue of online dispute resolution, resources permitting.[46]

252. At its forty-third session, the Commission had before it a note by the Secretariat on the issue of online dispute resolution (A/CN.9/706). The note, in particular, summarized the discussion at the colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State University Dickinson School of Law, under the title "A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader (consumer and merchant)" (Vienna, 29 and 30 March 2010).[47] The Commission also had before it a note by the Secretariat (A/CN.9/710) transmitting information provided by the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution.

253. The Commission noted that, during the colloquium, it had been said that proposals for regional online dispute-resolution systems were in the process of being developed and it might therefore be timely to deal with the matter internationally from the outset in order to avoid development of inconsistent

[45] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338, and A/CN.9/681/Add.2, para. 4.

[46] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 342-343.

[47] Information about the colloquium is available at the date of this report from www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf.

mechanisms. It was further noted that the goal of any work undertaken by UNCITRAL in that field should be to design generic rules, which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce),[48] could apply in both business-to-business and business-to-consumer environments.

254. The Commission was informed that the commonly shared view expressed during the colloquium was that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute-resolution system for small-value, high-volume business-to-business and business-to-consumer disputes. E-commerce cross-border disputes required tailored mechanisms that did not impose costs, delays and burdens that were disproportionate to the economic value at stake. Those views were generally supported in the Commission. The Commission also noted that work on the topic should recognize the digital divide and that more efforts should be made to hear the views of developing States.

255. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely. However, some concerns were expressed with regard to the scope of work to be undertaken. It was suggested that such scope should be limited, at an initial stage, to business-to-business transactions. It was pointed out that issues related to consumer protection were difficult to harmonize, since consumer protection laws and policies varied significantly from State to State. It was also stated that work in that area should be conducted with extreme caution to avoid undue interference with consumer protection legislation.

256. In response, the view was expressed that, in the present electronic environment, consumer transactions constituted a significant portion of electronic and mobile commercial transactions and were often cross-border in nature. It was also argued that it was practically and theoretically difficult to make a distinction not only between business-to-business and business-to-consumer transactions but also between merchants and consumers. It was concluded that work by a working group should be carefully designed not to affect the rights of consumers. Although it was generally felt that it would be feasible to develop a generic set of rules applicable to both kinds of transactions, it was also agreed that the working group should have the discretion to suggest different approaches, if necessary.

2. Decision by the Commission with respect to future work in the area of online dispute resolution in cross-border e-commerce transactions

257. After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions. It was also agreed that the form of the legal standard to be prepared should be decided by the working group after further discussion of the topic.

[48] United Nations publication, Sales No. E.99.V.4.

VIII. Possible future work in the area of insolvency law

258. The Commission had before it a series of notes (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6) setting forth a number of proposals for future work on insolvency law. The proposals contained in those documents were discussed at the thirty-eighth session of Working Group V (Insolvency Law) (A/CN.9/691, paras. 99-107). An additional document (A/CN.9/709) was submitted after that session of Working Group V, which set forth material additional to the proposal of Switzerland contained in document A/CN.9/WG.V/WP.93/Add.5.

259. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability. Those topics were:

(a) The United States' proposal as described in paragraph 8 of document A/CN.9/WG.V/WP.93/Add.1 to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Insolvency Law relating to centre of main interests and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention;[49]

(b) The proposals of the United Kingdom (see A/CN.9/WG.V/WP.93/Add.4), INSOL (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases. In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency and that criminal law issues were outside the scope of the mandate.

260. With respect to the proposal by Switzerland, the Commission agreed that the study (see A/CN.9/709, para. 7) should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.

261. The Commission heard a proposal by the Secretariat, which noted that participants in the judicial colloquiums that had been held by UNCITRAL in cooperation with INSOL and the World Bank (the Ninth Colloquium is scheduled for 2011) had indicated a desire for information and guidance for judges on cross-border-related issues and in particular on the UNCITRAL Model Insolvency Law. To that end, the Commission was informed that the Secretariat had been working on the preparation of a draft text that provided a judicial perspective on the

[49] See the related proposal of the Union internationale des Avocats referred to in the report of Working Group V on the work of its thirty-seventh session (Vienna, 9-13 November 2009) (A/CN.9/686, paras. 127-130).

use and interpretation of the UNCITRAL Model Insolvency Law. The Commission agreed that the Secretariat should be mandated to develop that text in the same flexible manner, resources permitting, as was achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*. That would involve consultation, principally with judges, but also with insolvency practitioners and professionals; consideration, at an appropriate stage, by Working Group V; and finalization and adoption by the Commission, possibly in 2011.

IX. Possible future work in the area of security interests

262. The Commission recalled that, at its forty-second session, in 2009, it had noted with interest the future work topics discussed by Working Group VI (Security Interests) at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). The Commission also noted that, at that session, it had agreed that: (a) the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector; and (b) the Commission would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session on the basis of a note by the Secretariat.[50] At its forty-third session, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1).

263. In addition, the Commission noted that Working Group VI, at its seventeenth session (New York, 8-12 February 2010), had engaged in a preliminary discussion of its future work programme (A/CN.9/689, paras. 59-61). The Commission also noted that, at that session, some support had been expressed for work on registration of security rights and a model law on secured transactions based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions*, while any work on security rights in securities would have to be limited to non-intermediated securities and any work on intellectual property licensing would need to be closely coordinated with WIPO (A/CN.9/689, para. 61).

264. The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2 (a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda (for the discussion of intellectual property licensing, see paras. 269-273 below). At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

265. It was widely felt that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively

[50] *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *Guide* did not address in sufficient detail the various legal, administrative infrastructural and operational questions that needed to be resolved to ensure the successful and efficient implementation of a registry.

266. It was also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*. In response to a statement that work by the Commission on registration of security rights should not duplicate work done, for example, in the context of the Convention on International Interests in Mobile Equipment (Cape Town, 2001),[51] it was pointed out that the Cape Town Convention registry was different from the registry recommended in the *Guide* at least to the extent that the Cape Town Convention registry was an asset-based international registry permitting registration of sales transactions.

267. With respect to work on security rights in non-intermediated securities, differing views were expressed. One view was that work should be undertaken to provide guidance to States with respect to security rights in a very important type of asset. It was stated that non-intermediated securities were used as security for credit in commercial financing transactions and yet they were generally excluded from the scope of the *Guide* and the Unidroit Convention on Substantive Rules for Intermediated Securities (2009).[52] Another view was that there was no reason why the recommendations of the *Guide* should not apply to security rights in non-intermediated securities, a result that could be achieved by a change in the scope provisions of the *Guide*. It was stated that the Secretariat could study that matter and report to the Commission at a future session. Yet another view was that any work on security rights in non-intermediated securities should be postponed until the International Institute for the Unification of Private Law (Unidroit) had had a chance to complete its work on a commentary and an accession kit to the Geneva Securities Convention, as well as to consider its future work in the area of financial markets.

268. After discussion, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the *Guide* and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.

269. The Commission next considered the topic of intellectual property licensing, a topic at the intersection of intellectual property and contract law. It was widely felt

[51] Available at the date of this report from www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf.

[52] Available at the date of this report from www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf.

that the Commission did not have sufficient information to make a decision as to the desirability and feasibility of any work on that topic. The Commission, therefore, considered whether to request the Secretariat to prepare a desirability and feasibility study that would identify any particular needs and suggest specific ways in which those needs could be addressed by a legal text to be prepared by the Commission with a view to removing any legal obstacles to intellectual property licensing practices hindering the development of international trade.

270. Differing views were expressed as to whether the topic of intellectual property licensing fell within the mandate of the Commission and, as a result, whether the Commission could undertake any work on that topic. One view was that, to the extent that intellectual property licensing involved contract issues and formed an important part of international trade, it was within the mandate of the Commission. Another view was that intellectual property licensing was more properly viewed as an intellectual property law topic that fell within the scope of work of other organizations, such as WIPO. After discussion, the Commission agreed that intellectual property licensing was a topic at the intersection of intellectual property and commercial law and thus, while it fell within the mandate of the Commission, any work by the Commission should be undertaken in cooperation with other organizations, such as WIPO.

271. Differing views were also expressed as to the scope of any study to be prepared by the Secretariat. One view was that the study should examine the desirability and feasibility of work on various issues related to intellectual property licensing. It was stated that the outcome of the study should not be prejudged. In that connection, it was observed that the result of the study could well be that work was both necessary and possible on a narrow topic or on no topic at all. In addition, it was pointed out that the Commission had experience in the preparation of such desirability and feasibility studies in the context of a careful, open and deliberate process, involving expert group meetings, colloquiums and seminars, and was confident that that process would produce the best possible and broadly acceptable result for consideration by the Commission. Moreover, it was said that, as the study would have to be prepared within existing resources and other work had priority, the Secretariat would probably need some time to prepare it.

272. Another view was that the study should examine a narrow topic related to secured transactions, such as, for example, whether licensee rights could be used as security for credit and, if so, in which rights exactly and under which conditions. It was stated that, in the absence of any specific indication of a particular need, no work was warranted of a broader scope. It was also observed that experience gained from work on intellectual property licensing at the national level suggested that such work was not desirable or feasible. In that connection, it was emphasized that issues arising with respect to patent licensing were different from those arising with respect to copyright licensing. It was also pointed out that, even within the area of copyright licensing, the issues arising with respect to software licensing were different from those arising in the context of movie or music licensing. In addition, it was said that difficulties would be compounded at the international level in view of the wide divergences existing between the various legal systems. Some doubt was expressed as to whether the topic of licensee rights as security for credit warranted any future work in particular in view of the work that had been done by the

Commission on the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property.

273. After discussion, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices. It was widely felt that the study should establish specific needs and appropriate ways in which those needs could be addressed, and carefully identify the suitability and the scope of work to facilitate consideration of the topic by the Commission at a future session. It was also generally agreed that the Secretariat should consult relevant international organizations, such as WIPO, and experts who had significant experience in intellectual property licensing, both from the public and the private sector, including those who relied on the licensing of intellectual property in their own commercial practices. It was also generally agreed that the Secretariat should consider addressing a questionnaire to States to assess the needs and any possible ways in which they could be addressed.

X. Possible future work in the area of microfinance

274. The Commission recalled that, at its forty-second session, in 2009, it had heard a suggestion that it would be timely for UNCITRAL to carry out a study on microfinance with the purpose of identifying the need for a legal and regulatory framework aimed at protecting and developing the microfinance sector so as to allow its continuous development, consistent with the purpose of microfinance, which was to build inclusive financial sectors for development. It was further recalled that, after discussion at that session, the Commission had requested the Secretariat, subject to the availability of resources, to prepare a detailed study on the legal and regulatory issues of microfinance as well as proposals as to the form and nature of a reference document that the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world in establishing a favourable legal framework for microfinance. The Commission had also requested the Secretariat to work in conjunction with experts and to seek possible cooperation with other interested organizations for the preparation of such a study, as appropriate.[53]

275. At its forty-third session, the Commission had before it a note by the Secretariat containing a study and proposals as requested (A/CN.9/698). The note, it was explained, sought to examine and provide an overview of the issues relating to the regulatory and legal framework of microfinance.

276. It was recognized that, in facilitating access to financial services to the many poor who were not currently served by the formal financial system, microfinance could play an important role as a tool for the alleviation of poverty and achievement

[53] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 432-433.

of the Millennium Development Goals.[54] It was also noted that an appropriate regulatory environment contributed to the development of the microfinance sector.

277. A number of delegates cautioned against UNCITRAL straying too far into the field of domestic banking and financial regulation, one delegation noting that this had proved to be a subject of acrimonious debate when raised in other international forums. The question was raised as to whether microfinance was an appropriate field of work for UNCITRAL, given that its mandate related to international trade. It was also stated that many aspects of microfinance seemed to be largely domestic issues and that the supranational aspect of any work in the area should be made clear.

278. One observer outlined some of the key current developments in the field, including the increasing "commercialization" of microfinance over the past several years; the extension of the microfinance concept beyond credit to encompass a wider array of financial services to the poor, including insurance and remittances; the growth of "branchless banking"; and the expansion of mobile telephony in the delivery of financial services.

279. Several speakers noted that, since a number of other organizations were currently actively developing policy and standards in the microfinance field, it was necessary to ensure that any involvement by UNCITRAL should be undertaken in close cooperation with other key players. It was stated that care should be taken to complement, and avoid duplication of, work that other organizations were doing.

280. After discussion, the Commission agreed that the Secretariat should convene a colloquium, with the possible participation of experts from other organizations working actively in that field, to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of UNCITRAL. The colloquium should result in a report to the Commission at its next session, outlining the issues at stake and containing recommendations on work that UNCITRAL might usefully undertake in the field.

XI. Monitoring implementation of the New York Convention

281. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of IBA, aimed at monitoring the legislative implementation of the New York Convention and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under that Convention.[55] A questionnaire had been circulated to States with the purpose of identifying how the Convention had been incorporated into national legal systems and how it was interpreted and applied. One of the central issues to be considered under that project was whether States parties had included additional requirements for recognition and enforcement of arbitral awards that were not provided for in the Convention. It was also recalled that the Secretariat had presented an interim report

[54] Further information about the Millennium Development Goals is available at the date of this report from www.un.org/millenniumgoals/bkgd.shtml.

[55] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

to the Commission at its thirty-eighth session, in 2005, which had set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project (A/CN.9/585).[56]

282. The Commission further recalled that, at its forty-first session, in 2008, it had considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the Convention, based on replies sent by 108 States parties (A/CN.9/656 and Add.1). At that session, the Commission had welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the Convention. The Commission had been generally of the view that the outcome of the project should consist in the development of a guide to enactment of the Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States diverged from the spirit of the Convention. The Commission had requested the Secretariat to study the feasibility of preparing such a guide and to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received.[57]

283. The Commission also recalled that, at its forty-second session, in 2009, it had heard an oral report on the project. The Commission had noted in particular that a draft guide to enactment of the New York Convention was being planned for preparation and that information collected during the project implementation, to the extent it was confirmed to be accurate, would be published on the UNCITRAL website.[58]

284. At its current session, the Commission noted with appreciation that, pursuant to its request, the information collected during the project implementation had been published on the UNCITRAL website in the language in which it had been received. To keep the compilation of information up to date and to enable the study based on that compilation to be as effective as possible, the Commission urged States to continue to provide the Secretariat with information regarding their implementation of the Convention. The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide to enactment of the Convention. It was agreed that a more substantive presentation on progress made in the preparation of the guide would be made at a future session of the Commission.

XII. Technical assistance to law reform

285. The Commission had before it a note by the Secretariat (A/CN.9/695 and Add.1) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its

[56] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 188-191.

[57] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355-356.

[58] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 360.

forty-second session, in 2009 (A/CN.9/675 and Add.1). The Commission emphasized the importance of such technical cooperation and assistance, in particular to the adoption and use of UNCITRAL texts, and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/695 and in particular for the broad range of activities undertaken to promote adoption of the Rotterdam Rules (see A/CN.9/695/Add.1). It was emphasized that legislative technical assistance, in particular to developing countries, was an activity that was not less important than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach to developing countries in particular. The Commission welcomed the suggestion of the Secretariat that a special report on promotional activities relating to each of the newly adopted legislative texts could be prepared for the Commission on an annual basis.

286. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission noted in particular that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities had to be very carefully considered and the number of such activities limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding and the availability of other resources to provide technical assistance, noting that UNCITRAL should have at its disposal the means necessary to carry out technical cooperation and assistance activities.

287. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their States or organizations that might partner with UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in their development. In particular, the Secretariat was encouraged to explore ways of collaborating further with other organizations, such as Unidroit and the Hague Conference on Private International Law, to jointly promote related texts.

288. The Commission also reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to Cameroon and Singapore for contributing to the Trust Fund since the Commission's forty-second session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

289. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission.

XIII. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

290. The Commission had before it a note by the Secretariat (A/CN.9/696), which set out the current status of the system for the collection and dissemination of case law on UNCITRAL texts (the CLOUT system) and provided an update on work undertaken by the Secretariat on digests of case law relating to the United Nations Convention on Contracts for the International Sale of Goods (1980)[59] and the Model Law on Arbitration. It also drew attention to the resource-intensive nature of that work and the need for additional resources to sustain it.

291. The Commission noted with appreciation the continuing work under the CLOUT system. As at 14 April 2010, 92 issues of compiled case-law abstracts from the CLOUT system had been published, dealing with 925 cases relating mainly to the United Nations Sales Convention and the Model Law on Arbitration. In addition, the Commission noted the increase in the abstracts of case law on the UNCITRAL Model Insolvency Law as well as the publication of abstracts on the New York Convention. The Commission also noted that a majority of the published abstracts concerned cases from Western European and other States and the remainder of the published abstracts concerned cases from other regions (Asia and the Pacific, Eastern Europe, Africa and Latin America and the Caribbean, listed in order of the number of published abstracts per region). It was widely agreed that the CLOUT system continued to be an important aspect of the overall technical cooperation and assistance activities undertaken by UNCITRAL and that its broad dissemination in all six official languages of the United Nations promoted the uniform interpretation and application of UNCITRAL texts. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. The Secretariat was encouraged to continue its efforts to extend the composition and vitality of the network of contributors to the CLOUT system.

292. The Commission took note that the digest of case law on the United Nations Sales Convention was currently being updated with a view to finalizing the draft in the fourth quarter of 2010. Preparation of the digest on the Model Law on Arbitration was also under way and should continue until the fourth quarter of 2010.

293. The Commission thanked the Secretariat for its work in this area and agreed that CLOUT and digests were important assets — which it was essential to sustain — for promoting awareness, harmonization and uniform interpretation of the law relating to UNCITRAL texts. The Commission fully supported a call for increased resources to support and enlarge the work of the Secretariat in this area.

XIV. Status and promotion of UNCITRAL texts

294. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/694) and information obtained by the Secretariat subsequent to the submission of that note. The Commission noted with appreciation

[59] United Nations, *Treaty Series*, vol. 1489, No. 25567.

the information on the following treaty actions and legislative enactments received since its forty-second session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)[60] (28 States parties);

(b) Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)[61] (20 States parties);

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)[62] (34 States parties);

(d) United Nations Convention on Contracts for the International Sale of Goods (1980)[63] (new actions by the Dominican Republic and Turkey (accessions); 76 States parties);

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (1988)[64] (the Convention has 5 States parties; it requires 10 States parties for entry into force);

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, (1991)[65] (the Convention has four States parties; it requires five States parties for entry into force);

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995)[66] (eight States parties);

(h) United Nations Convention on the Assignment of Receivables in International Trade (2001)[67] (the Convention has one State party; it requires five States parties for entry into force);

(i) United Nations Convention on the Use of Electronic Communications in International Contracts (2005)[68] (new actions by Honduras and Singapore (ratifications); the Convention has two States parties; it requires three States parties for entry into force);

(j) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)[69] (signatures by Armenia, Cameroon, the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Madagascar, Mali, the Netherlands, the Niger, Nigeria, Norway, Poland, Senegal,

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[60] *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

[61] United Nations publication, Sales No. E.95.V.13.

[62] United Nations publication, Sales No. E.95.V.14.

[63] United Nations publication, Sales No. E.95.V.12.

[64] United Nations publication, Sales No. E.95.V.16.

[65] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

[66] United Nations publication, Sales No. E.97.V.12.

[67] United Nations publication, Sales No. E.04.V.14.

[68] United Nations publication, Sales No. E.07.V.2.

[69] United Nations publication, Sales No. E.09.V.9.

Spain, Switzerland, Togo and the United States; the Convention requires 20 States parties for entry into force);

(k) Convention on the Recognition and Enforcement of Foreign Arbitral Awards[70] (new action by the former Yugoslav Republic of Macedonia (withdrawal of reservation); 144 States parties);

(l) UNCITRAL Model Law on International Commercial Arbitration (1985),[71] as amended in 2006[72] (new legislation based on the Model Law as amended in 2006, has been adopted in Ireland (2010), Rwanda (2008) and, in the United States, in the State of Florida (2010));

(m) UNCITRAL Model Law on International Credit Transfers (1992);[73]

(n) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[74] (new legislation based on the Model Law has been adopted in Armenia (2005) and Georgia (1999));

(o) UNCITRAL Model Law on Electronic Commerce (1996)[75] (new legislation based on the Model Law has been adopted in Iran (Islamic Republic of) (2004) and Jamaica (2006));

(p) UNCITRAL Model Law on Cross-Border Insolvency (1997)[76] (new legislation based on the Model Law has been adopted in Canada (2009) and Greece (2010));

(q) UNCITRAL Model Law on Electronic Signatures (2001)[77] (new legislation based on the Model Law has been adopted in Jamaica (2006); legislation influenced by the principles on which the Model Law is based has been adopted in India (2009));

(r) UNCITRAL Model Law on International Commercial Conciliation (2002)[78] (new legislation based on the Model Law has been adopted in Albania (2003) and Honduras (2000)).

295. During the session, Turkey deposited its instrument of accession to the United Nations Sales Convention. In a statement to the Commission, the representative of Turkey stated that the development of international trade on the basis of equality and mutual benefit was an important element in promoting friendly relations among States and that the improvement of the legal framework in which international trade operated was a fundamental aspect of such development process.

296. Following that, Singapore deposited its instrument of ratification to the United Nations Convention on the Use of Electronic Communications in International Contracts during the session. In a statement made by the representative of

[70] United Nations, *Treaty Series*, vol. 330, No. 4739.
[71] United Nations publication, Sales No. E.95.V.18.
[72] United Nations publication, Sales No. E.08.V.4.
[73] United Nations publication, Sales No. E.99.V.11.
[74] United Nations publication, Sales No. E.98.V.13.
[75] United Nations publication, Sales No. E.99.V.4.
[76] United Nations publication, Sales No. E.99.V.3.
[77] United Nations publication, Sales No. E.02.V.8.
[78] United Nations publication, Sales No. E.05.V.4.

Singapore, it was noted that the Convention set a new global standard for national e-commerce legislation. It was noted that Singapore had been among those States which had been at the forefront of implementing laws relating to e-commerce and information and communications technology. The representative of Singapore indicated that Singapore had enacted legislation to give effect to that Convention in its domestic laws. He noted that wider adoption of the Convention would be an important step towards harmonizing e-commerce legislation. The representative of Honduras, which had deposited its instrument of ratification of the Convention a few weeks before, also emphasized the role that the Convention could play in fostering regional development in the field of e-commerce. He encouraged States to adopt the Convention and promote it in their respective regions.

297. The Commission was informed that Australia had recently enacted legislation based on the UNCITRAL Model Law on Arbitration, as amended in 2006.

298. The Commission was informed, and noted with appreciation, that a number of States were in the process of becoming parties to or adopting various UNCITRAL instruments. Those States were urged to share such information with the Commission and the Secretariat when available.

XV. Working methods of UNCITRAL

299. The Commission recalled that, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635) and had engaged in a preliminary exchange of views on those observations and proposals. It was agreed at that session that the issue of working methods would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (Vienna, 10-14 December 2007). In order to facilitate informal consultations among all interested States, the Secretariat was requested to prepare a compilation of procedural rules and practices established by UNCITRAL itself or by the General Assembly in its resolutions regarding the work of the Commission. The Secretariat was also requested to make the necessary arrangements, as resources permitted, for representatives of all interested States to meet on the day prior to the opening of the resumed fortieth session of the Commission and, if possible, during the resumed session.[79] At its resumed fortieth session, the Commission had considered the issue of working methods on the basis of the observations and proposals by France on the working methods of the Commission (A/CN.9/635) and observations by the United States on the same topic (A/CN.9/639), as well as the requested note by the Secretariat on rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1-6). The Commission was informed about the informal consultations held on 7 December 2007 among representatives of all interested States on the rules of procedure and methods of work of the Commission. At that session, the Commission had agreed that:

(a) Any future review should be based on the previous deliberations on the subject in the Commission, the observations by France and the United States

[79] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 234-241.

(A/CN.9/635 and A/CN.9/639, respectively), and the note by the Secretariat (A/CN.9/638 and Add.1-6), which was considered to provide a particularly important historical overview of the establishment and evolution of UNCITRAL rules of procedure and methods of work;

(b) The Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission with the application of rules of procedure and methods of work, in particular as regards decision-making and participation of non-state entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6). That working document would serve for future deliberations on the subject in the Commission in formal and informal settings. It was understood that, where appropriate, the Secretariat should indicate its observations on rules of procedure and methods of work for consideration by the Commission;

(c) The Secretariat should circulate the working document to all States for comment and subsequently compile any comments it might receive;

(d) Informal consultations among all interested States might be held, if possible, before the forty-first session of the Commission;

(e) The working document might be discussed already at the Commission's forty-first session, time permitting.[80]

300. The Commission also recalled that, at its forty-first session, in 2008, it had had before it a note by the Secretariat describing current practices of the Commission as regards decision-making, status of observers in UNCITRAL, and preparatory work by the Secretariat (A/CN.9/653). At that session, the Commission had also had before it a note by the Secretariat compiling the comments received on the note by the Secretariat (A/CN.9/653) prior to the Commission's forty-first session (A/CN.9/660 and Add.1-5). The Commission requested the Secretariat to prepare a first draft of a reference document, based on the note by the Secretariat (A/CN.9/653), for use by chairpersons, delegates and observers and by the Secretariat itself. It was understood that the reference document should be somewhat more normative in nature than document A/CN.9/653. While the term "guidelines" was most often used to describe the future reference document, no decision was made as to its final form. The Secretariat was requested to circulate the draft reference document for comments by States and interested international organizations and to prepare a compilation of those comments for consideration by the Commission at its forty-second session. Without prejudice to other forms of consultation, the Commission had decided that two days should be set aside for informal meetings to take place, with interpretation in the six official languages of the United Nations, at the beginning of the forty-second session of the Commission, to discuss the draft reference document.[81]

301. The Commission further recalled that, at its forty-second session, in 2009, it had had before it a note by the Secretariat containing a first draft of a reference document (A/CN.9/676), comments by States and interested international organizations (A/CN.9/676/Add.1-9) and a proposal by France (A/CN.9/680) for

[80] Ibid., (A/62/17), part II, paras. 101-107.

[81] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 373-381.

revisions to be made to the reference document A/CN.9/676. It was recalled that the Commission had devoted the first two days of that session to informal consultations on the topic of working methods and that the discussion in the plenary had been based on document A/CN.9/676. The Commission also recalled that after discussion in the plenary at that session it had agreed on some revisions to be made in the document, postponed the consideration of other proposed revisions on which the Commission was not able to reach a decision and also deferred the consideration of those parts of the document which the Commission was not able to consider at that session for lack of time.[82]

302. At its forty-third session, the Commission had before a note by the Secretariat containing a proposed summary of conclusions on UNCITRAL rules of procedure and methods of work (A/CN.9/697). That summary of conclusions had resulted from intersessional consultations among interested delegations. The Commission also had before it a note reproducing comments of Burundi regarding UNCITRAL working methods (A/CN.9/697/Add.1). Those comments, based on document A/CN.9/676, had been received by the Secretariat after the Commission's forty-second session.

303. The Commission considered that document A/CN.9/697 was a suitable basis for continuation of the discussion. It was agreed that the summary of conclusions annexed to that note did not attempt to provide a complete set of rules but constituted the best possible rendition of the main characteristics of the methods of work of UNCITRAL. One delegation regretted that the preparation of a more detailed set of rules of procedure could not be achieved.

304. The Commission agreed that documents previously prepared by the Secretariat, in particular document A/CN.9/638 and Add.1-6, should remain available for future reference.

305. After discussion, the Commission unanimously adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work, as reproduced in annex III to the present report.

306. With respect to the implementation of that text, it was emphasized that all chairpersons should adhere to the principles expressed in the summary of conclusions at future sessions. The Secretariat was requested to issue any reminder that might be necessary to ensure strict compliance with those principles. As to non-governmental organizations, whose contribution was generally recognized as welcome and essential to the work of the Commission and its Working Groups, it was emphasized that only those organizations which were expected to contribute positively to the advancement of a project should be invited to participate in a session.

XVI. Coordination and cooperation

A. General

307. The Commission had before it a note by the Secretariat (A/CN.9/707 and Add.1) providing a brief survey of the work of international organizations related to

[82] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 379-397.

the harmonization of international trade law, focusing upon substantive legislative work. The Commission commended the Secretariat for the preparation of the documents, recognizing their value to coordination of the activities of international organizations in the field of international trade law. The Commission recalled that, at its forty-first and forty-second sessions, in 2008 and 2009, the Secretariat had suggested that the timing of both its general annual report on the current activities of international organizations related to the harmonization and unification of international trade law, as well as its ongoing series of specialized reports on particular topics, would in the future not necessarily be published prior to the annual session of the Commission.[83] The Commission welcomed the information that, given the growing interest in insolvency issues that had been witnessed in the light of the ongoing global economic crisis, the Secretariat would soon publish a more detailed study on insolvency-related activities.

308. It was recalled that, at its thirty-seventh session, in 2004, the Commission had agreed that it should adopt a more proactive attitude, through its secretariat, in fulfilling the terms of its mandate as regards coordination activities.[84] Recalling General Assembly resolution 64/111 of 16 December 2009 (see paras. 340 and 341 below), in which the Assembly had endorsed the efforts and initiatives of the Commission towards coordination of activities of international organizations in the field of international trade law, the Commission noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Organization of American States, Unidroit, WIPO, the World Bank and other multilateral development banks, and the World Trade Organization. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

309. By way of example of current efforts at coordination, the Commission noted the coordination activities listed in documents A/CN.9/695, paragraphs 26-30, and A/CN.9/695/Add.1, paragraph 13, and in particular the meetings involving the Hague Conference on Private International Law and Unidroit.

B. Reports of other international organizations

310. The Commission took note of statements made on behalf of IATA and ITU.

311. The Commission heard a statement on behalf of IATA concerning its work on e-freight, aimed at taking the paper out of air cargo and replacing it with the exchange of electronic data and messages. Noting that e-freight was live in 24 locations in 2009, IATA was focusing on increasing that number, by the end

[83] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 382; and ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 398.

[84] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 114.

of 2010, to include 44 e-freight locations and 76 major airports and the number of electronic messaging standards that replace paper documents from 16 to 20. With respect to the latter, the Commission was advised that work was proceeding on development of the e-air waybill and that its use was live in more than 20 locations. In total, locations that accounted for more than 80 per cent of all international air freight would be e-freight-capable by the end of 2010.

312. The Commission also heard a statement on behalf of ITU concerning its work on issues of cybersecurity, including identity management, data privacy and security of electronic transactions. The Commission took note of the close cooperation between ITU and UNCITRAL in the formulation of legal standards related to those issues and encouraged further efforts in that direction.

XVII. Role of UNCITRAL in promoting the rule of law at the national and international levels

313. The Commission recalled that this item had been on the agenda of the Commission since its resumed fortieth session (Vienna, 10-14 December 2007). It was further recalled that the decision to consider this item had been taken on the basis of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels.[85] In paragraph 3 of that resolution as well as paragraph 7 of resolution 63/128 of 11 December 2008, the General Assembly invited the Commission to comment in its report to the Assembly on its current role in promoting the rule of law. The Commission recalled that it had subsequently transmitted its comments, as requested, in its annual reports to the Assembly.[86]

314. At its forty-third session, the Commission took note of General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels. The Commission noted in particular that in paragraphs 4 and 8 the General Assembly called upon the United Nations system to systematically address aspects of the rule of law in relevant activities, and encouraged the Secretary-General and the United Nations system to accord high priority to rule of law activities. The Commission further noted that the Assembly in paragraph 9 of that resolution had invited the Commission (together with the International Court of Justice and the International Law Commission) to continue to comment, in its reports to the Assembly, on its current role in promoting the rule of law.

315. The Commission also noted that in paragraph 12 of the same resolution, the General Assembly had decided that at its sixty-fifth session, in 2010, the debates in the Sixth Committee under the agenda item on the rule of law would be focused on the sub-topic "Laws and practices of Member States in implementing international law", without prejudice to the consideration of the item as a whole. The Commission noted that the Sixth Committee had reached the understanding that comments related to this sub-topic should address, among other things, laws and practices in the domestic implementation and interpretation of international law, strengthening and improving coordination and coherence of technical assistance and

[85] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 111-113.

[86] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; and ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 415-419.

capacity-building in that area, mechanisms and criteria for evaluating the effectiveness of such assistance, ways and means of advancing donor coherence and perspectives of recipient States.[87] The Commission therefore decided that, at its current session, its comments to the General Assembly would focus on that sub-topic and the issues identified by the Sixth Committee, as envisaged from the perspective of the work of UNCITRAL.

316. The Commission held a panel discussion on the sub-topic. Opening remarks were delivered by the Deputy Secretary-General, who welcomed the panel discussion on the rule of law in trade and commerce and highlighted the relevance of that discussion (and of the work of UNCITRAL in general) for the United Nations entire rule of law agenda. The Deputy Secretary-General referred to the role of UNCITRAL in promoting the rule of law at the national and international levels, the impact of the work of UNCITRAL on economic and social development, including the achievement of the Millennium Development Goals, and in the context of post-conflict reconstruction. She also highlighted the mandate of UNCITRAL to coordinate activities of organizations active in the field of international commercial law and to encourage cooperation among them. The Deputy Secretary-General concluded her remarks by expressing the hope that better integration of the work of UNCITRAL into the United Nations joint rule of law programmes would be achieved. She saw the panel discussion as a welcome step in that direction. She encouraged all concerned to follow-up by raising awareness about the work of UNCITRAL across the United Nations and by promoting regular interaction between UNCITRAL and other relevant actors. To that end, she highlighted the role of the United Nations Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General.

317. A first round of discussion, with presentations by representatives of Ghana, Honduras and Slovenia, focused on the issues of "Laws and practices of States in the domestic implementation and interpretation of UNCITRAL texts: perspectives of recipient States on the work of UNCITRAL". A second round, with presentations by the Director of the Rule of Law Unit of the Secretariat, the Legal Counsel of the World Bank and the Deputy General Counsel of EBRD, focused on the issues of "Coordination and coherence of technical assistance and capacity-building in the areas of UNCITRAL work, and mechanisms and criteria for evaluating the effectiveness of such assistance".

318. In his introductory remarks, the Director of the Rule of Law Unit informed the Commission about the mandates of the Unit and the Rule of Law Group.

319. In the course of two rounds of discussion, speakers echoed the Secretary-General's call for careful and context-specific analysis of the relationship between law and economics, and the impact the economic crisis has had on legal protection, justice and security for the most vulnerable and marginalized populations.[88] The positive correlation between advancement of democracy, legal reform and economic development was pointed out. The point was also made that laws and regulations governing finance and commerce were not purely technical matters, but embodied

[87] See the note by the Chairman of the Sixth Committee (A/C.6/63/L.23), para. 3.

[88] See A/64/298, para. 78.

particular policy preferences. Their effectiveness should not be measured in isolation but in the context of the broader goals of sustainable, equitable and inclusive growth.

320. The Commission was also informed that, in a speech to the Security Council on 29 June 2010, the Under-Secretary-General for Legal Affairs, the Legal Counsel, had drawn the attention of the Council on the work of UNCITRAL and emphasized the supportive role played by effective commercial law in addressing root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources. The Council had been informed that UNCITRAL would hold a panel discussion to analyse the impact of commercial law and commercial activities on the rule of law, in a debate that was described as rare in the United Nations, where the traditional focus in the context of the rule of law had been on human rights, criminal law and international public law.

A. Laws and practices of States in the domestic implementation and interpretation of UNCITRAL texts: perspectives of recipient States on the work of UNCITRAL

321. In her opening remarks, the Deputy Secretary-General noted that UNCITRAL, with its mandate to work in the interests of all peoples, and in particular those of developing countries, had continuously sought more effective ways to deliver, to build local capacities and to respond to needs "on the ground". She noted that UNCITRAL promoted the rule of law in both national and cross-border contexts: by developing a modern commercial law framework; by assisting States to implement it; and by helping them to fulfil their international commitments, under the auspices of other international and regional organizations. She also remarked that UNCITRAL had less visible but no less important impacts in addressing the roots of economic tensions and problems, such as poverty and inequality, or disputes over access to shared resources. She also referred to the role of UNCITRAL in promoting regional and international integration, which could deter cross-border tensions from escalating into conflicts. The relevance of the work of UNCITRAL in the areas of arbitration and conciliation, public procurement, privately financed infrastructure projects and microfinance to the challenges of transitional justice and post-conflict reconstruction, such as the creation of jobs for ex-combatants and internally displaced persons, was also highlighted.

322. The Commission was informed that the Secretary-General had called for firmly grounding the United Nations rule of law work in the development agenda of the Organization. The crucial role of the work of UNCITRAL in facilitating economic and social development, including through the achievement of the Millennium Development Goals, was emphasized in that context. Specific reference was made to Goal 8, on the promotion of an open, rule-based, predictable, non-discriminatory trading and financial system. The contribution of UNCITRAL to other Goals in many other ways, direct and indirect, including by the creation of legal frameworks to mobilize resources, was also emphasized.

323. Other speakers elaborated on the above points by illustrating, with practical examples, the impact of UNCITRAL on the promotion of the rule of law in their

jurisdictions and in their regions or subregions. They referred to various UNCITRAL instruments (conventions, model laws and legislative guides) as representing globally recognized best practices and balancing the interests of various stakeholders. Organizations that partnered with UNCITRAL in their activities reported that UNCITRAL texts were used by them as a benchmark in assessing the need for legal reforms in countries where they operated.

324. In the context of the promotion of good governance, specific reference was made by speakers to the 1994 Model Procurement Law, which touched upon such issues as anti-corruption, accountability and transparency in public administration. In the context of promotion of access to justice and culture of the rule of law in the society as a whole, speakers referred to UNCITRAL instruments in the area of commercial dispute resolution. The role of texts produced by UNCITRAL in the area of insolvency, especially at the time of economic crisis, was also highlighted, as providing for rule-based resolution of financial difficulties, exit mechanisms and distribution of assets. The impact of UNCITRAL texts, in particular in the areas of sale of goods and e-commerce, on economic development and modernization of business practices was also underscored. The point was also made that possible future work by UNCITRAL in the area of microfinance could contribute to the achievement of the Millennium Development Goals.

325. The Commission heard that in some countries UNCITRAL texts had facilitated regional integration and that some States used UNCITRAL texts in their bilateral programmes of technical assistance with commercial law reforms, judicial training and promotion of cross-border judicial cooperation.

326. It was reported that, in some States, the policymaking, monitoring, coordination and enforcement mechanisms in relation to international legal standards had not kept pace with the international development of finance and commerce. Another speaker referred to the gap between the quality of such international legal standards and the quality of their implementation in some States. The point was made that good laws denied economic potential if not or not properly implemented and that confidence in the rule of law would inevitably be undermined if the expectation existed that the law would not be enforced.

327. In that context, speakers were unanimous in commending efforts of UNCITRAL aimed at ensuring effective implementation and uniform interpretation of international commercial standards through technical assistance with law reform in the field of commercial law. The importance of the CLOUT system was also emphasized. Speakers expressed the need to secure sufficient resources to sustain and expand the work of UNCITRAL in those areas, which were considered vital for States with limited capacity in the field of commercial law.

328. Concern was expressed about the low representation of developing countries at the sessions of UNCITRAL. It was pointed out that addressing the needs of the global economy required the active participation of developing countries. A participatory and inclusive legislative process was considered critical to the development of well-balanced legislation and essential to ensuring that its legitimacy would be recognized worldwide. The Commission and its secretariat were requested to find ways to increase outreach to developing countries, including through regional and subregional organizations established by those countries.

B. Coordination and coherence of technical assistance and capacity-building in the areas of UNCITRAL work, and mechanisms and criteria for evaluating the effectiveness of such assistance

329. In her opening remarks, the Deputy Secretary-General highlighted the challenges that the United Nations faced in promoting the rule of law, including being more responsive to the needs of Member States; empowering national stakeholders; mobilizing local knowledge and resources; and constantly monitoring and evaluating the impact of work. She emphasized that those challenges and the range of issues related to the rule of law could only be addressed collectively — by the whole United Nations system in close cooperation and coordination with outside actors. In that context, she referred to the special role played by UNCITRAL as the core United Nations legal body in the field of international commercial law with the specific mandate to coordinate activities of organizations active in that field.

330. Coordination was considered by speakers to be essential in achieving coherence, efficient use of scarce resources and for sharing and widely disseminating knowledge and best practices. Coordination with other aid providers, it was pointed out, was often one of the criteria used for evaluating the effectiveness of technical assistance and capacity-building.

331. The need to adjust the approach of the international community to the rule of law in the light of the lessons learned from the most recent economic crisis was emphasized. Particular reference in that regard was made to the need to ensure country-led reform and country-level coordination.

332. It was acknowledged that UNCITRAL played a commendable role in fostering cooperation and coordination in the field of international commercial law. However, practical difficulties faced by UNCITRAL and its secretariat in ensuring better coordination were recognized. The potential facilitating role of the Rule of Law Group and the Rule of Law Unit in that respect was emphasized.

333. The Director of the Rule of Law Unit briefed the Commission about the current work and future plans of the Group and the Unit in achieving coordination and coherence of United Nations rule of law activities. In the Unit's view, it was important to achieve better integration of the expertise of UNCITRAL into the United Nations joint rule of law activities. Although it was recognized that the United Nations engagement often took place in a volatile environment where the dominant concerns were peace and security, it was acknowledged that taking other measures to enable or promote long-term economic and social development was necessary. The Unit would find it helpful to receive from UNCITRAL any reference materials, such as a summary of lessons learned and good practices collected as a result of UNCITRAL technical cooperation and assistance activities, that would facilitate better understanding and integration by the United Nations system of the work of UNCITRAL into the United Nations joint rule of law activities.

C. Decisions by the Commission

334. At the end of the panel discussion, the Commission reiterated its conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the

national and international levels, including through the Rule of Law Group supported by the Rule of Law Unit. The Commission looked forward to being part of strengthened and coordinated rule of law activities of the Organization.

335. The Commission considered it essential to keep a regular dialogue with the Rule of Law Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into the United Nations joint rule of law activities. To that end, it requested the Secretariat to organize briefings by the Rule of Law Unit biannually, when sessions of the Commission were held in New York.

336. The Commission requested the Secretariat to initiate surveys and studies of the impact of the standards and activities of UNCITRAL on the rule of law and development, in cooperation with the World Bank and other partner organizations that would have the required research capacities in those areas. The Commission also requested the Secretariat to review its experience with the operation of the technical cooperation and assistance programme conducted on behalf of the Commission, with a view to identifying lessons learned, best practices and major problems encountered, and to suggesting ways of enhancing technical cooperation and assistance and capacity-building in the field of commercial law and mechanisms for evaluating their effectiveness. The Commission also requested the Secretariat to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through United Nations Development Programme or other country offices of the United Nations.

XVIII. International commercial arbitration moot competitions

A. Willem C. Vis International Commercial Arbitration Moot 2010

337. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Seventeenth Moot. The oral arguments phase had taken place in Vienna from 26 March to 1 April 2010. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Seventeenth Moot had been based on the United Nations Sales Convention. A total of 252 teams from law schools in 62 countries had participated in the Seventeenth Moot. The best team in oral arguments was that of King's College London. The oral arguments of the Eighteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 15 to 21 April 2011.

338. It was also noted that the Seventh Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Chartered Institute of Arbitrators, East Asia Branch, and also co-sponsored by the Commission. The final phase had been organized in Hong Kong Special Administrative Region of China from 15 to 21 March 2010. A total of 75 teams from 18 countries had taken part in the Seventh (East) Moot. The winning team in the oral arguments was from the University of Freiburg, Germany. The Eighth (East) Moot would be held in Hong Kong SAR from 4 to 10 April 2011.

B. Madrid Commercial Arbitration Moot 2010

339. It was noted that the Carlos III University of Madrid had organized the Second International Commercial Arbitration Competition in Madrid from 28 June to 2 July 2010. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition were the Model Law on Arbitration, with amendments as adopted in 2006, the United Nations Sales Convention, the New York Convention, the Unidroit Model Law on Leasing[89] and the Unidroit Convention on International Financial Leasing (1988).[90] A total of 18 teams from law schools or master programmes in seven countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was from the University of Zaragoza, Spain. The Third Madrid Moot would be held in 2011 on dates yet to be confirmed. It was also noted that the Centre for the Study of Law, Economics and Politics (CEDEP) had organized a Moot competition in Asunción on 12 June 2010. Legal issues involved in the competition were similar to those of the Madrid Moot. Teams from law schools in three different countries (Argentina, Colombia and Paraguay) participated in the Moot in Asunción. The winning team in oral arguments was from the Universidad Católica "Nuestra Señora de la Asunción".

XIX. Relevant General Assembly resolutions

340. The Commission took note with appreciation of two General Assembly resolutions related to the work of UNCITRAL, adopted at the sixty-fourth session on the recommendation of the Sixth Committee: resolution 64/111, on the report of UNCITRAL on the work of its forty-second session; and resolution 64/112, on the Practice Guide on Cross-Border Insolvency Cooperation of UNCITRAL, both of 16 December 2009.

341. The Commission noted that, in its resolution 64/111, the General Assembly, inter alia:

(a) Commended the completion of the Commission's project in the area of insolvency law, and welcomed the comprehensive review by the Commission of its working methods, the continuing discussion of its role in promoting the rule of law at the national and international levels, and the progress made in other areas, including public procurement and arbitration, and as regards publication of digests of case law and maintenance of the UNCITRAL website;

(b) Noted with appreciation the Commission's decisions as regards: (i) holding colloquiums on electronic commerce and security interests; (ii) publication of various texts on security interests prepared by the Commission and its secretariat; and (iii) commending the use of the 2007 revision of the Uniform Customs and Practice for Documentary Credits in transactions involving the establishment of a documentary credit;

[89] Available at the date of this report from www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf.

[90] Available at the date of this report from www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm.

(c) Endorsed the efforts and initiatives of the Commission towards implementation of the Commission's programmes of technical assistance, and coordination and cooperation, and in that context: (i) reiterated its appeal to relevant organizations for further cooperation and coordination of their activities with those of the Commission; (ii) encouraged the Commission to explore different approaches to the use of partnerships with non-state actors; (iii) called for contributions to the UNCITRAL trust funds; (iv) noted the Commission's request to the Secretariat to explore the possibility of establishing an UNCITRAL presence in regions or specific countries with a view to facilitating the provision of technical assistance with respect to the use and adoption of UNCITRAL texts; and (v) took note the Commission's comments made in the context of its consideration of the proposed strategic framework for the period 2010-2011 that additional resources were required to be allotted to the Secretariat in particular to meet the increased demand for technical assistance;

(d) Requested the Secretary-General to explore options for the timely publication of the UNCITRAL *Yearbook*, to continue providing summary records of the Commission's meetings relating to the formulation of normative texts, and to bear in mind the particular characteristics of the mandate and work of the Commission in implementing page limits with respect to the documentation of the Commission.

342. The Commission noted that, in its resolution 64/112, the General Assembly requested the Secretary-General to publish, including electronically, the text of the Practice Guide on Cross-Border Insolvency Cooperation, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available. The Commission also noted that the Assembly recommended that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings, and that all States continue to consider implementation of the UNCITRAL Model Insolvency Law.

XX. Other business

A. Internship programme

343. An oral report was presented on the internship programme at the UNCITRAL secretariat. In particular, it was noted that, since the Secretariat's oral report to the Commission at its forty-second session, in July 2009, 26 new interns had undertaken internship with the UNCITRAL secretariat.

344. The Commission noted that the Secretariat, in selecting interns from the Interns Roster maintained and administered by the United Nations Office at Vienna, kept in mind the needs of UNCITRAL and its secretariat at any given period of time, in particular the need to maintain the UNCITRAL website in six official languages of the United Nations. From that perspective, the Commission noted with regret that during the period under review only a few candidates from Arabic-speaking countries and China had been available for selection from the Interns Roster. The Commission further took note that when a sufficient pool of qualified candidates was available the Secretariat tried to ensure a balanced gender

representation and representation of interns from various geographical regions, paying special regard to the needs of developing countries and countries with economies in transition. During the period under review, the secretariat had been able to select 10 female interns and 12 interns from developing countries and countries with economies in transition.

B. Strategic framework for the biennium 2012-2013

345. The Commission had before it the proposed strategic framework for the period 2012-2013 (A/65/6 (Prog. 6)) and was invited to review the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs). The Commission noted that the proposed framework had been reviewed by the Committee for Programme and Coordination at its fiftieth session (7 June-2 July 2010) and would be transmitted to the General Assembly at its sixty-fifth session.

346. Concerns were expressed that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased and pressing demands from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law. The Commission urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development be made promptly available.

347. The Commission was informed that the Secretariat was exploring various means of responding to the growing need for uniform interpretation of UNCITRAL texts. Such uniform interpretation was considered indispensable for the effective implementation of UNCITRAL texts. It was noted that some instruments emanated from the work of UNCITRAL explicitly prescribed that, in their interpretation, regard should be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade. Continuing work of the Secretariat on the CLOUT system as a means to comply with such a requirement was considered vital. Concern over the lack of sufficient resources in the Secretariat to sustain and expand such work was noted. Building partnerships with interested institutions and exploring various other means, besides seeking additional resources from the regular budget, were mentioned as possible ways to address that concern. The Commission also took note of the desirability of establishing within its secretariat a third pillar concentrating on the promotion of ways and means of encouraging uniform interpretation of UNCITRAL texts.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

348. It was recalled that, as indicated to the Commission at its fortieth session, in 2007,[91] the programme budget for the biennium 2008-2009 listed among the

[91] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17),

"Expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[92] The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-second session of the Commission.[93] It was further recalled that, at that session, the question had elicited replies from 15 delegations, with an average rating of 4.66.

349. Appreciation was expressed for efforts by the Secretariat in various fields related to the work of UNCITRAL, including in rendering assistance to various stakeholders in implementing projects aimed at dissemination of information about UNCITRAL texts, such as in organizing international commercial arbitration moot competitions. Satisfaction was expressed for the generally excellent quality of work delivered to UNCITRAL by its secretariat.

XXI. Date and place of future meetings

A. Forty-fourth session of the Commission

350. The Commission approved the holding of its forty-fourth session in Vienna from 27 June to 15 July 2011. The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

B. Sessions of working groups

351. At its thirty-sixth session, in 2003, the Commission had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[94]

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part I, para. 243.

[92] A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

[93] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 434.

[94] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

1. Sessions of working groups up to the forty-fourth session of the Commission

352. The Commission approved the following provisional schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its nineteenth session in Vienna from 1 to 5 November 2010 and its twentieth session in New York from 11 to 15 April 2011;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-third session in Vienna from 4 to 8 October 2010 and its fifty-fourth session in New York from 7 to 11 February 2011;

(c) Working Group III (Online Dispute Resolution) would hold its twenty-second session in Vienna from 11 to 15 October 2010 and its twenty-third session in New York from 14 to 18 March 2011;

(d) Working Group V (Insolvency Law) would hold its thirty-ninth session in Vienna from 6 to 10 December 2010 and its fortieth session in New York from 16 to 20 May 2011;

(e) Working Group VI (Security Interests) would hold its eighteenth session in Vienna from 8 to 12 November 2010 and its nineteenth session in New York from 14 to 18 February 2011.

353. The Commission authorized the Secretariat to adjust the schedule of working group meetings according to the needs of the working groups and the need to hold a colloquium on e-commerce (see para. 250 above) and a colloquium on microfinance (see para. 280 above). The Secretariat was requested to post on the UNCITRAL website the final schedule of the working group meetings once the dates of the meetings had been confirmed.

Additional time

354. Tentative arrangements were made for a session to be held in New York from 23 to 27 May 2011. That time could be used to accommodate the need for a session of a working group or for holding a colloquium, depending on the needs of the working groups and subject to consultation with States.

2. Sessions of working groups in 2011 after the forty-fourth session of the Commission

355. The Commission noted that tentative arrangements had been made for working group meetings in 2011 after its forty-fourth session (the arrangements were subject to the approval of the Commission at its forty-fourth session):

(a) Working Group I (Procurement) would hold its twenty-first session in Vienna from 17 to 21 October 2011;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-fifth session in Vienna from 5 to 9 September 2011;

(c) Working Group III (Online Dispute Resolution) would hold its twenty-fourth session in Vienna from 12 to 16 December 2011;

(d) Working Group IV (Electronic Commerce) would hold its forty-fifth session in Vienna from 10 to 14 October 2011;

(e) Working Group V (Insolvency Law) would hold its forty-first session in Vienna from 31 October to 4 November 2011;

(f) Working Group VI (Security Interests) would hold its twentieth session in Vienna from 12 to 16 September 2011.

Annex I

UNCITRAL Arbitration Rules

(as revised in 2010)

Section I. Introductory rules

Scope of application*

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

(a) Received if it is physically delivered to the addressee; or

(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by

* A model arbitration clause for contracts can be found in the annex to the Rules.

registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

(f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating and appointing authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration

the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the

presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Disclosures by and challenge of arbitrators[**] (articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

[**] Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

2. The statement of claim shall include the following particulars:

(a) The names and contact details of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defence

Article 21

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 24

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Evidence

Article 27

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 28

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a

witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 29

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Default

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 31

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Decisions

Article 33

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award

Article 34

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Applicable law, *amiable compositeur*

Article 35

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination

Article 36

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5, shall apply.

Interpretation of the award

Article 37

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

Correction of the award

Article 38

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Additional award

Article 39

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

Definition of costs

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Fees and expenses of arbitrators

Article 41

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Deposit of costs

Article 43

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Annex

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:

(a) The appointing authority shall be ... [name of institution or person];

(b) The number of arbitrators shall be ... [one or three];

(c) The place of arbitration shall be ... [town and country];

(d) The language to be used in the arbitral proceedings shall be ... .

Possible waiver statement

Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties

and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

Annex II

Terminology and recommendations of the UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property

A. Terminology

"Acquisition security right" includes a security right in intellectual property or a licence of intellectual property, provided that the security right secures the obligation to pay any unpaid portion of the acquisition price of the encumbered asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the encumbered asset.

"Consumer goods" includes intellectual property or a licence of intellectual property used or intended to be used by the grantor for personal, family or household purposes.

"Inventory" includes intellectual property or a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor's business.

B. Recommendations 243-248

Security rights in tangible assets with respect to which intellectual property is used

243. The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, a security right in the tangible asset does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

244. The law should provide that the registration of a notice of a security right in intellectual property in the general security rights registry remains effective notwithstanding a transfer of the encumbered intellectual property.

Priority of rights of certain licensees of intellectual property

245. The law should provide that the rule in recommendation 81, subparagraph (c), applies to the rights of a secured creditor under this law and does not affect the rights the secured creditor may have under the law relating to intellectual property.

Right of the secured creditor to preserve the encumbered intellectual property

246. The law should provide that the grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property.

Application of acquisition security right provisions to security rights in intellectual property

247. The law should provide that the provisions on an acquisition security right in a tangible asset also apply to an acquisition security right in intellectual property or a licence of intellectual property. For the purpose of applying these provisions:

(a) Intellectual property or a licence of intellectual property:

(i) Held by the grantor for sale or licence in the ordinary course of the grantor's business is treated as inventory; and

(ii) Used or intended to be used by the grantor for personal, family or household purposes is treated as consumer goods; and

(b) Any reference to:

(i) Possession of the encumbered asset by the secured creditor does not apply;

(ii) The time of possession of the encumbered asset by the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property; and

(iii) The time of the delivery of the encumbered asset to the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property.

Law applicable to a security right in intellectual property

248. The law should provide that:

(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;

(b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee; and

(c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Annex III

UNCITRAL rules of procedure and methods of work

Summary of conclusions

As decided by the Commission at its first session, rules relating to the procedure of committees of the General Assembly, as well as rules 45 and 60, shall apply to the procedure of the Commission. As the Commission has further decided, on matters not covered by these rules, the Commission shall be guided by the general principle that the rules of procedure of the General Assembly should apply, mutatis mutandis, to the Commission as may be appropriate for the performance of its functions.

Decision-taking

1. Decisions in the Commission are taken by member States of the Commission. The views of non-member States and observer organizations are for the benefit of member States who may take such views into account in determining their positions on the issue to be decided upon.

2. The practice in the Commission as reflected by existing procedures long used by the Commission is to reach decisions by consensus. The Commission has decided that Commission decisions should be reached by consensus as far as possible; in the absence of a consensus, decisions are to be taken by voting as provided for in the relevant rules of procedure of the General Assembly.

3. States are entitled to make explanations of vote and explanations of position and to have those statements reflected in the report, consistent with the rules of procedure of the General Assembly.

4. Voting is to be regarded as an exceptional procedure. It should be noted that voting in the Commission took place only once on a procedural matter.

Status of non-member States and observer organizations

5. **Non-member States** are entitled, when they so request, to attend the sessions of the Commission and its working groups as observers and may participate in the collective effort to achieve a generally acceptable text. However, they cannot object to a decision being recorded.

6. As regards **observer organizations**, sessions of the Commission and its subsidiary organs are open to representatives of international governmental and non-governmental organizations invited by the Commission, as discussed in paragraphs 8 to 10 below.

7. Observers, in particular non-governmental organizations, do not participate in the decision-taking.

8. United Nations organs and specialized agencies brought into relationship with the United Nations are permitted to participate in the sessions and the work of the Commission and its subsidiary organs.

9. The Commission shall draw up, and shall update as necessary, a list of other international organizations and of non-governmental organizations with which UNCITRAL entertains a long-standing cooperation and which have been invited to Commission sessions.

10. In addition, the Secretariat may be requested by the Commission or its subsidiary organs to invite a specific organization to the relevant session. It may also receive a request from an organization to be invited to a session, or it may itself take the initiative to invite an organization on the basis of its assessment of the relevance and potential contribution of the organization concerned to the proceedings of the relevant session. In such cases, the Secretariat shall inform the member States of the Commission. Where an objection is raised, the decision will be taken by the Commission.

Working methods of the UNCITRAL secretariat

11. The Secretariat may make either oral or written statements at any time to the Commission or its subsidiary organs concerning any question under consideration. Within the limits of its available resources, the Secretariat may have recourse to the assistance of outside experts from different legal traditions and affiliations. The Secretariat shall decide on the appropriate form that the assistance of outside experts may take depending on the needs of the Secretariat.

12. The Secretariat is not bound by the advice of such experts. It formulates its proposals to the Commission or its subsidiary organs under its own responsibility and in accordance with specific instructions received from the Commission or its subsidiary organs, if any, also bearing in mind the policies expressed in relevant General Assembly resolutions and decisions adopted previously by the Commission.

13. The Secretariat shall inform member States of the expert group meetings it holds as requested.

14. The UNCITRAL secretariat is committed to endeavour, resources permitting, to provide at such meetings translation and interpretation in as many official languages as appropriate.

15. Colloquiums organized or co-organized by the Secretariat shall be widely advertised, particularly by posting relevant information concerning such events on the UNCITRAL website. Their results shall be reported to the Commission or, as appropriate, to the working groups.

Annex IV

List of documents before the Commission at its forty-third session

Symbol	*Title or description*
A/CN.9/683 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-third session
A/CN.9/684	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)
A/CN.9/685	Report of Working Group VI (Security Interests) on the work of its sixteenth session (Vienna, 2-6 November 2009)
A/CN.9/686	Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session (Vienna, 9-13 November 2009)
A/CN.9/687	Report of Working Group I (Procurement) on the work of its seventeenth session (Vienna, 7-11 December 2009)
A/CN.9/688	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session (New York, 1-5 February 2010)
A/CN.9/689	Report of Working Group VI (Security Interests) on the work of its seventeenth session (New York, 8-12 February 2010)
A/CN.9/690	Report of Working Group I (Procurement) on the work of its eighteenth session (New York, 12-16 April 2010)
A/CN.9/691	Report of Working Group V (Insolvency Law) on the work of its thirty-eighth session (New York, 19-23 April 2010)
A/CN.9/692	Note by the Secretariat on present and possible future work on electronic commerce
A/CN.9/693	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL
A/CN.9/694	Note by the Secretariat on the status of conventions and model laws
A/CN.9/695 and Add.1	Note by the Secretariat on technical cooperation and assistance, including transport law
A/CN.9/696	Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/697 and Add.1	Note by the Secretariat on the UNCITRAL rules of procedure and methods of work; comments received from Member States and interested international organizations
A/CN.9/698	Note by the Secretariat on microfinance in the context of international economic development
A/CN.9/699 and Add.1-4	*UNCITRAL Legislative Guide on Insolvency Law*: draft part three; compilation of comments by Governments and international organizations
A/CN.9/700 and Add.1-7	Note by the Secretariat on the draft supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property
A/CN.9/701	Note by the Secretariat on the draft supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property; compilation of comments by Governments and international organizations

Symbol	*Title or description*
A/CN.9/702 and Add.1	Note by the Secretariat on possible future work on security interests
A/CN.9/703 and Add.1	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules
A/CN.9/704 and Add.1-10	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules; compilation of comments by Governments and international organizations
A/CN.9/705	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules
A/CN.9/706	Note by the Secretariat on possible future work on online dispute resolution in cross-border electronic commerce transactions
A/CN.9/707 and Add.1	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/708	Note by the Secretariat: revisions to A/CN.9/WG.V/WP.92 and Add.1; *UNCITRAL Legislative Guide on Insolvency Law*: part three: treatment of enterprise groups in insolvency
A/CN.9/709	Note by the Secretariat on insolvency law: possible future work; further proposal by the delegation of Switzerland for preparation by the UNCITRAL secretariat of a study on the feasibility and possible scope of an instrument regarding the cross-border resolution of large and complex financial institutions
A/CN.9/710	Note supporting the possible future work on online dispute resolution by UNCITRAL, submitted by the Institute of International Commercial Law: possible future work on online dispute resolution in cross-border electronic commerce transactions